Dollar Unilateralism:
The New Frontline of National Security

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This Article makes three points. First, it draws attention to a profound shift toward "dollar unilateralism" by the U.S. government as it advances core national security goals. Relying on the special status of the U.S. dollar, the government has enlisted foreign banks to isolate targeted entities and track illicit financial flows. Second, drawing on examples such as Iran's nuclear program, the Article identifies three formal and informal legal tactics the government has used to implement dollar unilateralism: financial sticks, high-profile blacklists, and direct diplomacy. Finally, the Article discusses the efficacy of dollar unilateralism and its implications for U.S. accountability. Dollar unilateralism challenges a conventional view about the inevitability of multilateral cooperation, and is a compelling strategy under three conditions. It also, however, presents new gaps in U.S. political accountability.

INTRODUCTION

Since 9/11, the U.S. government has enlisted a range of domestic private and international governmental actors to advance its counterterrorism and nuclear nonproliferation objectives. At the domestic level, the United States has relied on corporate participants in surveillance operations, such as PRISM[1] and

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1. Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps in to User Data of*

Xkeyscore,[2] to gain access to data on telephone calls and emails involving both U.S. citizens and foreigners. Domestic law scholars have offered probing accounts of these programs, concentrating on their constitutional and normative implications.[3] In the international arena, the United States has turned to international organizations, including the United Nations (U.N.) and the Financial Action Task Force (FATF) to implement anti–money laundering and counterterrorist financing policies. International law scholars have offered cogent analyses of these policies, focusing especially on their implications for human rights and international cooperation more generally.[4]

Lost in a gap between the domestic and international law literatures is a significant shift in government strategy—that is, the government's attempt to enlist foreign banks, not simply domestic firms or foreign governments, to pursue vital national security goals. More specifically, the government has turned to foreign banks to advance two core security objectives: stopping the financing of terrorism and nuclear proliferation ("cutting off the financial pipeline") and collecting financial data to identify illicit networks ("following the money"). While the government has previously used economic statecraft—such as trade embargoes and export controls—to shape the incentives of foreign firms, this is the first time it has ever deployed its current strategy of using its financial power to influence foreign banks with the goal of isolating targeted countries and entities.

The government's harnessing of foreign banks opens the door to a new form of unilateralism, which this Article terms "dollar unilateralism."[5] Dollar unilateralism occurs when the government uses the unique status of the U.S. dollar in global financial markets to pursue policy goals independently, rather than work through

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Apple, Google and Others, GUARDIAN (U.K.), June 6, 2013, at A1, *available at* http://theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data.

2. Glenn Greenwald, *XKeyscore: NSA Tool Collects "Nearly Everything a User Does on the Internet*,*"* GUARDIAN (U.K.) (July 31, 2013, 8:56 AM), http://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data.

3. *See, e.g.*, Danielle Keats Citron & Frank Pasquale*, Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. 1441 (2011); Amitai Etzioni, *The Privacy Merchants: What Is to Be Done?*, 14 U. PA. J. CONST. L. 929 (2012); Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901 (2008) [hereinafter Michaels, *All the President's Spies*]; Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317 (2008); Christopher Soghoian, *An End to Privacy Theater: Exposing and Discouraging Corporate Disclosure of User Data to the Government*, 12 MINN. J.L. SCI. & TECH. 191 (2011); Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741 (2008).

4. *E.g.*, Kenneth S. Blazejewski, *The FATF and Its Institutional Partners: Improving the Effectiveness and Accountability of Transgovernmental Networks*, 22 TEMP. INT'L & COMP. L.J. 1 (2008); Andrew Hudson, *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights*, 25 BERKELEY J. INT'L L. 203 (2007).

5. This Article emphasizes the procedural dimension of unilateralism and adopts a definition used by other scholars. As Monica Hakimi writes, "A state acts unilaterally when it does not channel through a formal international process the decision to act." Monica Hakimi, *Unfriendly Unilateralism*, 55 HARV. INT'L L.J. 105, 111 (2014); *see also* W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 3 (2000).

traditional inter-governmental and multilateral channels. This new strategy, deployed for national security objectives, raises a host of more specific questions: How precisely is the government able to harness foreign banks, including those without ties to the United States? Why do foreign banks cooperate with the government's strategy, especially when they are under no legal obligation to do so? What are the implications of this shift in security strategy for future U.S. policy and U.S. accountability?

This Article suggests that the government elicits cooperation from foreign banks, including those with weak or no ties to the United States, by deploying three tactics that fall along a continuum of legal formality: financial sticks, high-profile blacklists, and direct diplomacy. Financial sticks are the most formal and conventional of the three tools. They are congressional or executive measures that impose obligations on U.S. actors, but with the goal of pressuring foreign banks. As defined in this Article, high-profile blacklists involve the naming of entities or regions as potentially engaging in illicit conduct but without imposing obligations on U.S. financial actors. These are semiformal legal measures given that they are authorized as the first step under section 311 of the Patriot Act,[6] but do not require U.S. banks to take any measures (this legal directive occurs at the optional second step). Still, for material and reputational reasons, the government expects such blacklists to make not only U.S. but also foreign banks reduce their business with the named entities. Finally, the government, specifically the Treasury Department, has employed a systematic campaign that this Article terms "direct diplomacy." In an effort to persuade foreign banks to implement U.S. policy, high-ranking U.S. officials meet with foreign bank executives directly rather than attempt to influence them indirectly through interactions with their governments. This is the most informal of the three tactics; although Treasury can point to congressional statutes and executive orders granting it authority to take diplomatic action, these sources do not explicitly enumerate Treasury's responsibilities to engage in diplomacy but instead invest Treasury with broad discretionary powers. Treasury's use of direct diplomacy, moreover, does not involve imposing legal obligations on any actors.

Foreign banks appear to cooperate with U.S. harnessing policies for a variety of reasons, including avoiding government scrutiny and heavy fines, preserving their access to the U.S. financial market (and with it, U.S. currency), and minimizing the reputational risks of being associated directly or indirectly with a U.S.-targeted actor. They may cooperate for less material reasons as well, including out of a wave of international support and empathy in the aftermath of terrorism, or out of professional and social incentives that emerge from interacting with powerful U.S. officials.

To illustrate these harnessing tactics, this Article draws on three examples: Iran's nuclear program and its support of U.S.-designated terrorist groups, North Korea's nuclear proliferation policy, and intelligence collection by the Society for Worldwide Interbank Financial Telecommunication (SWIFT), a Belgian-incorporated telecommunication consortium of private banks. In the first two cases, the government's main goal has been to recruit foreign banks to help cut off the financial

6. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 311, 115 Stat. 272, 298 (codified as amended at 31 U.S.C. § 5318A (2012)).

pipeline to terrorists and nuclear proliferators. In the third case, the government enlisted SWIFT officials to gain access to troves of financial data.

The government's dollar unilateralism challenges the important assumption held by many, though not all, international legal scholars that globalization has rendered the need for multilateral cooperation among states more pressing than ever before.[7] The increasing integration of the global economy, the rise of both licit and illicit transnational networks, and profound technological change have, this view holds, undermined the capacity of states to unilaterally regulate activity within their own borders.[8] The analysis here suggests instead that the U.S. government's leveraging of its central position in global financial markets is likely to persist.[9]

Indeed, as the United States confronts new national security challenges, dollar unilateralism may well become routine policy. Treasury, as one journalist writes, has become "Obama's favorite noncombatant command."[10] The continued availability of unilateralism as a policy option for the United States points to a need to understand the conditions that influence its efficacy. This Article proposes three such conditions: industry structure, policy acceptability, and bargaining asymmetry.

This Article also contends that the harnessing of foreign banks raises questions about the government's political accountability, both domestically and internationally, that are generally overlooked by both domestic and international law literatures. These accountability concerns vary according to context (domestic or international) and the nature of the government's legal tactic (formal or informal). The Office of Foreign Assets Control (OFAC), which oversees Treasury's policy on sanctions (broadly defined) is, as one national security expert puts it, "probably one of the most powerful government agencies no one's ever

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7. *See, e.g.*, Kevin J. Cloherty & Jill L. Brenner, *Targeting Terror Dollars: Some Lessons from the Drug War*, 7 ANDREWS BANK & LENDER LIABILITY LIT. REP. 5 (2001); Stewart Patrick, *Multilateralism and Its Discontents: The Causes and Consequences of U.S. Ambivalence*, *in* MULTILATERALISM AND U.S. FOREIGN POLICY: AMBIVALENT ENGAGEMENT 1 (Stewart Patrick & Shepard Forman eds., 2002); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 285 (2004); Richard B. Stewart, Michael Oppenheimer & Bryce Rudyk, *Building Blocks for Global Climate Protection*, 32 STAN. ENVTL. L.J. 341 (2013); Brian Wilson, *Submersibles and Transnational Criminal Organizations*, 17 OCEAN & COASTAL L.J. 35, 46–47 (2011).

8. *See, e.g.*, RICHARD O'BRIEN, GLOBAL FINANCIAL INTEGRATION: THE END OF GEOGRAPHY (1992); Bernhard Grossfeld, *Global Accounting: Where Internet Meets Geography*, 48 AM. J. COMP. L. 261, 266 (2000) ("[G]lobalization finds its strongest expression in global capital markets."); Kanishka Jayasuriya, *Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?*, 8 CONSTELLATIONS 442, 447 (2001).

9. For additional support, see, e.g., Orde F. Kittrie, *New Sanctions for a New Century: Treasury's Innovative Use of Financial Sanctions*, 30 U. PA. J. INT'L L. 789, 790 (2009) ("[S]everal innovative aspects of these sanctions . . . seem highly likely to be replicated in the design of a wide range of future sanctions against other targets."); David D. Aufhauser, *Terrorist Financing: The Privatization of Economic Sanctions*, FED. LAW., Sept. 2009, at 22, 26 (stating that U.S. financial restrictions against Iran represent "a harbinger of future models of conduct"); Baran Han, *A Theory of Economic Sanctions* 27 (Korea Inst. for Int'l Econ. Policy, Working Paper No. 12-03, 2012).

10. David E. Sanger, *Obama Policy Is Put to Test*, N.Y. TIMES, Mar. 17, 2014, at A1.

heard of."[11] For some actors, this newfound power comes at a price. Even when conservatively deployed, dollar unilateralism has unintended humanitarian consequences. For instance, in response to the government's use of financial leverage, European banks have shut down many money-transfer businesses that they identified as posing money-laundering risks. The reverberations of this decision are felt acutely in Africa, where money transfers from the global diaspora serve as "an economic lifeline" for millions of Africans.[12] Forty percent of Somalis, for instance, depend on such transfers.[13]

Part I introduces domestic and international law scholarship on the government's post-9/11 national security policies and highlights the recent shift in government strategy. It underscores how this harnessing strategy differs from its predecessors, and it poses the Article's two central questions about how the government is able to enlist the cooperation of foreign banks and why foreign banks are willing to cooperate. Part II answers these questions, arguing that the government has used three main tactics and that foreign banks have cooperated for a set of diverse reasons. Part III suggests the conditions influencing the efficacy of this new model of unilateralism and identifies emerging gaps in U.S. accountability, both domestically and globally.

I. THE TURN TO FOREIGN BANKS AFTER 9/11

With a few exceptions, both domestic and international law scholars have overlooked the government's turn to dollar unilateralism.[14] Domestic law scholars have analyzed surveillance programs that depend on the cooperation of domestic corporations. Many international law scholars have focused primarily on the government's reliance on international organizations and transgovernmental networks and assumed this multilateralism to be increasingly necessary to fight cross-border threats.[15] Although a small group of international law scholars has acknowledged the persistence of unilateralism and debated its normative value, these scholars have generally overlooked this shift to a new form of unilateralism, which leverages U.S. financial power.

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11. Anna Yukhananov & Warren Strobel, *After Success on Iran, U.S. Treasury's Sanctions Team Faces New Challenges*, REUTERS, Apr. 14, 2014, *available at* http://www.reuters.com/article/2014/04/15/us-usa-sanctions-insight-idUSBREA3D1O820140415.

12. *Let Them Remit*, ECONOMIST (July 20, 2013), http://www.economist.com/news/middle-east-and-africa/21581995-western-worries-about-money-laundering-are-threatening-economic-lifeline.

13. *Id.*; *see also* EDWINA THOMPSON, ROBIN PLUMMER, KEITH SENTIS, MICHAEL CATALANO, JOHN THOMPSON & TOM KEATINGE, BEECHWOOD INT'L, SAFER CORRIDORS: RAPID ASSESSMENT (2013).

14. For exceptions, see Kittrie, *supra* note 9, at 815 n.119; PETER D. FEAVER & ERIC B. LORBER, LEGATUM INSTITUTE, COERCIVE DIPLOMACY: EVALUATING THE CONSEQUENCES OF FINANCIAL SANCTIONS 27 (2010).

15. *See infra* Part I.A.

A. Harnessing in Domestic and International Arenas

The United States has sought to curb cross-border threats by recruiting domestic corporate actors and working with foreign governments bilaterally and through international organizations and transgovernmental networks. Domestically, the government—specifically the Executive[16]—has, among other activities,[17] enlisted private companies to collect intelligence.[18] Warrantless wiretapping (exposed in 2005),[19] the "call-tracking program" (uncovered in 2006),[20] PRISM (exposed in 2013),[21] and Xkeyscore initiatives (revealed in 2013)[22] are among the better-known examples of public-private surveillance operations.[23] But the Executive has also launched lower-profile intelligence operations, relying on delivery services such as Federal Express ("FedEx") to access databases on international shipments,[24] airlines to obtain passenger

16. This Article uses the term "Executive" to refer generally to the executive branch of government, which includes Treasury but also encapsulates other agencies (e.g. the NSA).

17. Beyond its surveillance efforts, the government's most salient use of private actors in the post-9/11 period is its outsourcing security to private security contractors (PSCs) for military interventions and covert antiterrorist operations. Although the government has long used PSCs, its reliance on them after 9/11 reached unprecedented levels. Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1003 (2005); *see also* LAURA A. DICKINSON, OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS (2011); P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2003). For a survey of PSC involvement in military engagements, see Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1018–40 (2004) [hereinafter Michaels, *Beyond Accountability*].

18. In addition to relying on private companies for covert surveillance operations, the government has made extensive use of commercial data brokers to collect information on individuals, which is then analyzed by government officials. *E.g.*, Etzioni, *supra* note 3, at 934–37; Slobogin, *supra* note 3, at 320. Private companies have also been heavily involved in fusion centers, in which state agencies and law enforcement agencies at both the federal and state level coordinate efforts to collect and analyze intelligence. Citron & Pasquale, *supra* note 3, at 1449–50.

19. James Risen & Eric Lichtbau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

20. *E.g.*, Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls; 3 Telecoms Help Government Collect Billions of Domestic Records*, USA TODAY, May 11, 2006, at 1A.

21. *E.g.*, Greenwald & MacAskill, *supra* note 1.

22. *E.g.*, Greenwald, *supra* note 2.

23. *E.g.*, David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 63–64 (2013).

24. *See, e.g.*, Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1450, 1463–64 (2010) [hereinafter Michaels, *Deputizing Homeland Security*]; Robert Block, *Private Eyes: In Terrorism Fight, Government Finds a Surprising Ally: FedEx*, WALL ST. J., May 26, 2005, at A1.

information,[25] and U.S. financial institutions such as Bank of America[26] to access vast repositories of private financial data.[27]

Scholars have identified both functional and politically strategic reasons for the government's increased reliance on domestic firms. They suggest that private companies are both cheaper and better positioned to collect intelligence on private activities than government officials because companies interact more frequently with the public and in ways that often require the sharing of private information.[28] In terms of strategic benefits, private actors are legally and politically less constrained than the government.[29] By relying on such companies for intelligence, the Executive can benefit from a weak regime regulating corporate privacy while avoiding the political costs associated with "big brother" watchdog programs.[30]

As in the literature on privatization more generally,[31] domestic law scholars have raised concerns about executive aggrandizement and accountability.[32] Some

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25. *E.g.*, Matthew L. Wald & John Schwartz, *Screening Plans Went Beyond Terrorism*, N.Y. TIMES, Sept. 19, 2004, at N35; *Secure Flight Compared to CAPPS II*, ACLU (Mar. 29, 2005), http://www.aclu.org/technology-and-liberty/secure-flight-compared-capps-ii; *The Four Biggest Problems with the "Secure Flight" Airline Security Program*, ACLU (Mar. 24, 2005), http://www.aclu.org/technology-and-liberty/four-biggest-problems-secure-flight-airline-security-program.

26. ACLU, THE SURVEILLANCE INDUSTRIAL COMPLEX: HOW THE AMERICAN GOVERNMENT IS CONSCRIPTING BUSINESSES AND INDIVIDUALS IN THE CONSTRUCTION OF A SURVEILLANCE SOCIETY 20–21 (2004), *available at* https://www.aclu.org/files/FilesPDFs/surveillance_report.pdf [hereinafter SURVEILLANCE INDUSTRIAL COMPLEX].

27. *See, e.g.*, LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY 164–65 (2008); David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1409–18 (2007).

28. Minow, *supra* note 17, at 1003–04; *see also* Donald G. Featherstun, D. Whitney Thornton II & J. Gregory Correnti, *State and Local Privatization: An Evolving Process*, 30 PUB. CONT. L.J. 643, 648 (2001) (explaining the privatization of government functions more generally); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1295 (2003) (same). By relying on private data gathering, the government avoids the burden of intelligence gathering and focuses instead on analysis. SURVEILLANCE INDUSTRIAL COMPLEX, *supra* note 26, at 2. By enlisting private contractors, the government can also evade certain bureaucratic procedures such as the APA's notice and comment procedures, Michaels, *Beyond Accountability*, *supra* note 17, at 1038, and can select contractors already trained in recent innovative technologies, rather than conducting the training itself. Minow, *supra* note 17, at 1003–04.

29. Michaels, *All the President's Spies*, *supra* note 3, at 908–09. The ACLU makes the same point, but more bluntly: "[This strategy] allows the government to carry out privacy-invading practices at 'arm's length' . . . it could not carry out [such tasks] itself without serious legal or political repercussions." SURVEILLANCE INDUSTRIAL COMPLEX, *supra* note 26, at 2.

30. *See, e.g.*, SURVEILLANCE INDUSTRIAL COMPLEX, *supra* note 26, at 29–31; Michaels, *All the President's Spies*, *supra* note 3, at 908–09.

31. S*ee, e.g.*, Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507 (2001); Kimberly N. Brown, *"We the People," Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1365–67 (2013).

32. Academic work on recent surveillance operations has focused on other constitutional dimensions as well, including the constitutionality of government-corporate data mining initiatives. For privacy rights generally, see Daniel J. Solove, *A Taxonomy of*

scholars have highlighted a "doctrinal vacuum," noting that the Supreme Court has never ruled on the status of the government's Terrorist Surveillance Program (TSP) or its mining of data provided by third parties.[33] Others have highlighted institutional gaps.[34] Surveillance programs like Xkeyscore, for instance, proceed largely unchecked by Congress and the courts.[35] The covertness of such programs eliminates, for all practical purposes, the possibility of external monitoring. Intelligence agencies do not carry the burden of justifying their programs to outsiders and are not deterred by the possibility that their operations will be subjected to some form of ex post political or judicial review.[36]

Scholars have devoted less attention to the question of precisely *how* the Executive has secured the cooperation of domestic firms. Instead, most scholars assume that the government's legal authority over domestic firms makes law the main force driving both the government's harnessing strategy and corporate participation.[37] Reality is more complicated: even when the government has had formal legal authority to compel corporate cooperation, it has often turned to more informal tactics—what Jon Michaels labels as "handshake agreements"—to recruit domestic firms.[38] For instance, in contrast to the United States Postal Service and United Parcel Service, FedEx cooperated with government requests to open suspicious packages, even when the government lacked a search warrant. And while definitive proof of a quid pro quo exchange is difficult to come by, the government granted FedEx more government contracts after FedEx officials

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Privacy, 154 U. PA. L. REV. 477, 489 (2006) [hereinafter Solove, *A Taxonomy of Privacy*]. For First Amendment rights specifically, see Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 170 (2007) [hereinafter Solove, *The First Amendment*]; Strandburg, *supra* note 3, at 743–44. For Fourth Amendment rights, see, e.g., Fred H. Cate, *Government Data Mining: The Need for a Legal Framework*, 43 HARV. C.R.-C.L. L. Rev. 435, 451 (2008); Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 WAKE FOREST L. REV. 643, 661 (2008); Stephen E. Henderson, *Beyond the (Current) Fourth Amendment: Protecting Third-Party Information, Third Parties, and the Rest of Us Too*, 34 PEPP. L. REV. 975, 976–77 (2007).

33. *See, e.g.*, Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMMENT. 483, 509–13 (2010); Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 589–92 (2010) ("The fact that the Supreme Court has never clarified (and, in fact, has consistently avoided clarifying) the precise legal status of intelligence continues to be an obstacle for meaningful intelligence governance.").

34. *E.g.*, Kitrosser, *supra* note 33, at 503–04; Michaels, *All the President's Spies*, *supra* note 3, at 922–26.

35. *E.g.*, Greenwald, *supra* note 2; Paul Lewis, *White House Unable to Confirm if Congress Briefed on NSA Spy Program*, GUARDIAN (U.K.), July 31, 2013, http://www.theguardian.com/world/2013/jul/31/white-house-congress-nsa-xkeyscore.

36. Michaels, *All the President's Spies*, *supra* note 3, at 933. Scholars express similar accountability concerns about the government's increasing use of PSCs. Private security contractors allow the Executive to bypass Congress since the traditional mechanisms of congressional constraint—limiting access to military troops, setting disciplinary guidelines for the use of force, and reducing the level of military funding—are less available. PSCs also make monitoring more difficult. Michaels, *Beyond Accountability*, *supra* note 17, at 1063–74.

37. *E.g.*, Cate, *supra* note 32; Donohue, *supra* note 32; Solove, *A Taxonomy of Privacy*, *supra* note 32. *But see* Michaels, *All the President's Spies*, *supra* note 3; Michaels, *Deputizing Homeland Security*, *supra* note 24.

38. Michaels, *All the President's Spies*, *supra* note 3, at 904.

cooperated and gave them special access to information about security threats.[39] After 9/11, the Bush Administration also relied on persuasion tactics to elicit the participation of Western Union, with former CIA Director George Tenet asking for that company's informal assistance: "What I'm asking is that you and your company be patriots."[40]

Does it matter whether the government uses its formal legal authority or other forms of influence to elicit the cooperation of domestic companies? While government surveillance raises concerns about executive accountability on its own, such concerns are compounded when intelligence gathering proceeds through informal rather than formal legal channels.[41] As Jon Michaels argues, handshake agreements free the government from legal and political constraints.[42] When approaching specific companies, the Executive does not, for instance, have to seek congressional approval. There are fewer reporting requirements, fewer documents to examine ex post, and thus less pressure on intelligence operatives to evaluate their programs critically and proffer justifications for their existence.[43] The Executive is also under less pressure to justify its decisions to the American public.[44]

While domestic law scholars have focused on the government's post-9/11 domestic security strategy, international law scholars have analyzed its reliance on transnational governmental networks and international governmental organizations.[45] For instance, some scholars have explored U.S. engagement at the

39. *Id.* at 915–16 (noting that FedEx has gained special access to government security databases, was granted a seat on the Federal Bureau of Investigation's (FBI) regional terrorism task force, and was awarded a license from Tennessee to use police powers to investigate crimes and make arrests). By contrast, the telecommunications company Qwest lost government contracts after it refused to cooperate with the government's Call-Data Program, under which other telecommunication companies transferred massive stores of "envelope information" (or metadata) to the NSA. *Id.* at 912–13. There, the NSA allegedly told Qwest officials that its refusal to hand over data might hurt its chances of getting classified work from the government. *Id.* The former CEO of Qwest further claims that his prosecution for insider trading, resulting in four years in prison was in retaliation for his refusal to cooperate. Dionne Searcey, *Ex-CEO Exits Prison with a New Set of Pals*, WALL ST. J., Sept. 28, 2013, at A1.

40. Michaels, *All the President's Spies*, *supra* note 3, at 914. This "just ask" strategy appears to have been effective. For instance, a large number of airlines, including JetBlue, Northwest, American Airlines, and United Airlines, have handed over troves of passenger data to the government based on such informal requests. SURVEILLANCE INDUSTRIAL COMPLEX, *supra* note 26, at 10–11.

41. Michaels, *All the President's Spies*, *supra* note 3, at 924–25.

42. *See id.* at 954.

43. *See id.* at 934.

44. SURVEILLANCE INDUSTRIAL COMPLEX, *supra* note 26, at 2.

45. *E.g.*, John W. Head, Essay, *What Has Not Changed Since September 11—The Benefits of Multilateralism*, 12 KAN. J.L. & PUB. POL'Y 1 (2002). International law scholars have also focused heavily on U.S. military operations in Afghanistan and Iraq, particularly the interventions' legality and legitimacy. *See generally* Tawia Ansah, *War: Rhetoric & Norm-Creation in Response to Terror*, 43 VA. J. INT'L L. 797 (2003); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7 (2003).

U.N., where U.S. officials have worked both behind the scenes and publicly, lobbying the Security Council and the General Assembly to adopt wholesale U.S. sanctions against individuals, organizations, and states identified as national security threats.[46] Scholars have also examined U.S. policy at the Financial Action Task Force (FATF), the main international organization that addresses money laundering and terrorist financing, where U.S. officials have worked with foreign officials to promote the implementation of anti–money laundering and counterterrorist financing policies.[47]

Many, though not all, international law scholars have assumed this reliance on multilateral institutions to be a necessity, not a choice.[48] In a globalized era marked by transnational criminal networks and the ability to move money instantaneously across national borders, states, including the United States, can no longer fight transnational security threats on their own.[49] Now more than ever, individuals or entities that seek to escape a government's jurisdiction may reroute or relocate illicit activity beyond a government's reach, a phenomenon

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46. In one prominent article, Jose Alvarez points to U.S. influence over the U.N. Security Council's counterterrorism policies and resolutions as a clear example of "hegemonic law." He writes, "No one has yet countered the suggestion, made by U.S. government officials when the CTC [Counter-Terrorism Committee] was established, that it was aimed at globally exporting U.S. counterterrorism legislation, particularly the U.S. PATRIOT Act." Jose E. Alvarez, Editorial Comment, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 875 (2003).

47. Much of this scholarship emphasizes the role of the United States in shaping FATF policies. *See, e.g.*, Richard K. Gordon, *On the Use and Abuse of Standards for Law: Global Governance and Offshore Financial Centers*, 88 N.C. L. REV. 501, 565–66 (2010); Ben Hayes, *Counter-Terrorism, "Policy Laundering," and the FATF: Legalizing Surveillance, Regulating Civil Society*, INT'L J. NOT-FOR-PROFIT L., Apr. 2012, at 5, 7.

48. I adopt the mainstream definition of multilateralism, which entails cooperation among governments. *See* John O. McGinnis, *The Political Economy of Global Multilateralism*, 1 CHI. J. INT'L L. 381, 382 (2000). Cooperation between governments and foreign private actors constitutes transnationalism. To be sure, scholars heralded the necessity of multilateral cooperation to address cross-border threats long before 9/11. *E.g.*, Jacqueline Ann Carberry, *Terrorism: A Global Phenomenon Mandating a Unified International Response*, 6 IND. J. GLOBAL LEGAL STUD. 685, 709 (1999) ("Due to the global nature of terrorism, States rely less frequently on exclusively unilateral policies toward terrorism."); Ernesto Samper Pizano, *Colombia's Commitment Toward a Global Agenda Against Drugs*, 1 UCLA J. INT'L L. & FOREIGN AFF. 265, 269 (1997) (stating that international cooperation, as opposed to unilateralism, is the "most adequate instrument" for confronting global challenges); Fred C. Pedersen, Comment, *Controlling International Terrorism: An Analysis of Unilateral Force and Proposals for Multilateral Cooperation*, 8 U. TOL. L. REV. 209 (1976) (discussing multilateral cooperation as a means to address international terrorism). This view took on new force, however, after the terrorist attacks. For a variety of views in the pre-9/11 period, both endorsing and criticizing unilateralism, see Symposium, *Unilateralism in International Law: A United States-European Symposium*, 11 EUR. J. INT'L L. 1 (2000).

49. *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Bruce Zagaris, *The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes After September 11, 2001*, 22 BERKELEY J. INT'L L. 123 (2004).

sometimes referred to as "leakage"[50] or "crime displacement."[51] Governments may act extraterritorially under only very limited conditions, which makes it exceedingly difficult to detain or even track rogue actors and activity without the cooperation of other states.[52]

This view of multilateral cooperation pervades both policy and scholarship and spans diverse issue areas.[53] Urging more multilateral cooperation to fight drug trafficking, for instance, Deputy Director of the Global Maritime Operational Threat Response Coordination Center at the Department of Homeland Security Brian Wilson stated, "Successful pursuit of submersibles requires multilateral collaboration because the operating environment is simply too large for any nation to address individually."[54] Legal scholar Marshall Lloyd echoed, "Drug trafficking, for example, presents a different kind of crisis in light of the operations of criminal organizations. The impact of drug cartels and other groups extends beyond the jurisdictional reach of any one nation or organization."[55]

Writing more generally about the limited ability of states to unilaterally impose sanctions, scholars Anu Bradford and Omri Ben-Shahar explain:

> In today's integrated economy, unilateral sanctions are even less likely to be successful than they were in the past, because Targets have more opportunities to circumvent sanctions. . . . If the US refuses to buy oil from Iraq, the import ban can hardly be effective if Iraq can divert that forgone trade to third countries. Similarly, if the US prohibits its firms from selling anything but essential medicines to Iran,

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50. This term is used in the environmental literature. Jonathan Wiener, for instance, highlights how unilateral action would likely drive companies to move their emissions activity to unregulated areas. Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1967–70 (2007).

51. Tomer Broude & Doron Teichman, *Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity*, 62 VAND. L. REV. 795, 808–09 (2009).

52. It is widely accepted that states may assert extraterritorial jurisdiction based on nationality (nationality jurisdiction). Much more controversially, a state may arguably assert jurisdiction if its national security interests are affected (protective principle), if the conduct violates a *jus cogen* norm (universal jurisdiction), or based on the nationality of a victim (passive personality principle). For a discussion of these bases of jurisdiction see, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 401 (1987); CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 6–9 (2008).

53. For this point relating to transnational maritime crime, see Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73 (2008). For crime in tax law, see Stephen Troiano, *Current Development: The U.S. Assault on Swiss Bank Secrecy and the Impact on Tax Havens*, 17 NEW ENG. J. INT'L & COMP. L. 317 (2011).

54. Wilson, *supra* note 7, at 46.

55. Marshall B. Lloyd, *Conflict, Intervention, and Drug Trafficking: Unintended Consequences of United States Policy in Colombia*, 36 OKLA. CITY U. L. REV. 293, 296 (2011). Stacey Mathews noted about trafficking in children, "A multinational response with international coordination of law enforcement is required to thwart the enormous problem of trafficking." Stacey Mathews, Comment, *International Trafficking in Children: Will New U.S. Legislation Provide an Ending to the Story?*, 27 HOUS. J. INT'L L. 649, 653 (2005).

> the measure is futile if other countries continue to supply Iran with comparable products at a comparable price. In other words, unilateral trade sanctions often only alter trade routes and capital flows without affecting the total level of commerce.[56]

Scholars and policy makers have applied this observation to a range of transnational challenges that go beyond the implementation of sanctions,[57] such as human trafficking[58] and cross-border carbon emissions.[59] Unilateralism is, in this view, an inadequate response to transnational challenges. Foreign policy expert Stewart Patrick put it this way: "[T]he choice is not between unilateralism and multilateralism but among variants of the latter."[60]

In contrast to this dominant view about the necessity of multilateralism, a narrower strand of international law scholarship has recognized the persistence of U.S. unilateralism to address cross-border security threats—most obviously illicit trade in weapons of mass destruction (WMD) and terrorism, but also corruption[61] and human trafficking.[62] The primary focus of this scholarship is normative. While recognizing the need to assess unilateralism in its specific context,[63] most scholars have also suggested more general arguments favoring

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56. Anu Bradford & Omri Ben-Shahar, *Efficient Enforcement in International Law*, 12 CHI. J. INT'L L. 375, 390 (2012) (citations omitted).

57. Cloherty & Brenner, *supra* note 7 (arguing that international cooperation is imperative to fight terrorism).

58. Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317, 336 (2005).

59. Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 98–99 (2008).

60. Patrick, *supra* note 7, at 2.

61. *See, e.g.*, William Magnuson, *International Corporate Bribery and Unilateral Enforcement*, 51 COLUM. J. TRANSNAT'L L. 360 (2013).

62. *See, e.g.*, Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437 (2006). Other scholars have written about the use of unilateralism more generally, by countries other than the United States, e.g., Hakimi, *supra* note 5; Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1 (2014), and for a range of transnational challenges including climate change, trade, and human rights. *E.g.*, Rachel Brewster, *Shadow Unilateralism: Enforcing International Trade Law at the WTO*, 30 U. PA. J. INT'L L. 1133 (2009); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1 (2001); Peter G. Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 COLUM. J. TRANSNAT'L L. 33 (2002); Thihan Myo Nyun, *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions Against the Military Government of Burma/Myanmar*, 7 WASH. U. GLOB. STUD. L. REV. 455 (2008); Gregory Shaffer & Daniel Bodansky, *Transnationalism, Unilateralism and International Law*, 1 TRANSNAT'L ENVTL. L. 31 (2012).

63. *See* Jose E. Alvarez, *Multilateralism and Its Discontents*, 11 EUR. J. INT'L L. 393, 403 (2000) [hereinafter Alvarez*, Multilateralism and its Discontents*] ("The question—is unilateralism or multilateralism a good thing?—cannot be answered in the abstract."); Shaffer & Bodansky, *supra* note 62, at 41 ("The impact of unilateral action ultimately depends on whether it is persuasive in shaping norms of behavior."); *see also* Cleveland, *supra* note 62, at 7 (discussing the possible efficacy of unilateralism in advancing human

or denouncing its use. Some scholars have underscored the role of unilateralism in helping to enforce or generate international law.[64] Others have emphasized its efficacy in certain issue areas, such as promoting the development and internalization of human rights norms,[65] stemming climate change,[66] or fighting human trafficking.[67] A number of scholars have criticized unilateralism as a function of domestic politics and argued that it undermines rather than reinforces multilateral institutions.[68] Still others have criticized the use of unilateralism for specific issues, such as battling corruption,[69] as well as drug and human trafficking.[70]

Mirroring the tendencies of domestic law scholarship, these normative analyses generally overlook questions about how a government proceeds unilaterally—the precise tactics it uses.[71] This silence is problematic partly because it leaves unanswered questions by those who suggest unilateralism is becoming obsolete about how the government is able to surmount displacement and leakage barriers. It is also troubling for another reason: by disregarding the process of unilateralism, international legal scholars have failed to recognize the government's profound shift in individual tactics and overall strategy to address cross-border threats, leaving their normative assessments, at best, incomplete.

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rights); Hakimi, *supra* note 5 (discussing how in some conditions unilateral action is preferable to multilateral action).

64. *E.g.*, Maggie Gardner, *Channeling Unilateralism*, 56 HARV. INT'L L.J. (forthcoming 2015); Hakimi, *supra* note 5, at 107.

65. *See* Cleveland, *supra* note 62, at 31–48. *But see* Nyun, *supra* note 62.

66. *E.g.*, Joanne Scott & Lavanya Rajamani, *EU Climate Change Unilateralism*, 23 EUR. J. INT'L L. 469 (2012); Shaffer & Bodansky, *supra* note 62, at 38 (defending unilateralism on the ground that "relying on formal treaty negotiations may be too little too late to prevent dangerous climate change").

67. *E.g.*, Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT'L L. 1143, 1147 (2003) ("'Multilateral conventions' lowest common denominator 'solutions' [may] prove less efficacious than a hegemon's concerted efforts to enforce extraterritorially its own domestic law to the same ends.'" (alteration in original) (quoting Jose Alvarez, *Why Nations Behave*, 19 MICH. J. INT'L L. 303, 316 (1998)).

68. *E.g.*, Danchin, *supra* note 62, at 109–13.

69. Magnuson, *supra* note 61, at 411–17 (stating that unilateralism has led to biased enforcement, overenforcement, and increased levels of instability).

70. *E.g.*, Chuang, *supra* note 62; Lloyd, *supra* note 55; Monica Serrano, *Unilateralism, Multilateralism, and U.S. Drug Diplomacy in Latin America*, *in* UNILATERALISM AND U.S. FOREIGN POLICY: INTERNATIONAL PERSPECTIVES 117 (David M. Malone & Yuen Foong Khong eds., 2003).

71. For exceptions, see James W. Coleman, *Unilateral Climate Regulation*, 38 HARV. ENVTL. L. REV. 87 (2014) (discussing how the United States has used unilateralism as a mechanism for pressuring or inspiring other countries to change their own regulations and policies or as a stepping stone toward multilateral treaties); *see also* Krisch, *supra* note 62; Magnuson, *supra* note 61; Shaffer & Bodansky, *supra* note 62, at 34–35 (discussing how U.S. unilateral actions spurred multilateral action).

B. The Turn to Foreign Banks

The government's policy of harnessing foreign banks serves two core goals: cutting off the financial pipeline[72] and "following the money trail."[73] To achieve these interrelated objectives, the government has exploited its financial leverage to pressure and persuade foreign banks to cut their business ties with targeted actors and hand over financial intelligence.

This strategy is new. Although the government has a long history of using economic statecraft such as trade embargoes, agency designations, and export controls to pursue its security interests,[74] it has never adopted the finance-based strategy it is now using.[75] Traditionally, the government's use of economic statecraft has been characterized by two features: the core purpose of prohibiting "U.S. persons"[76] from engaging in transactions with the targeted country, and the

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72. *See An Assessment of the Tools Needed to Fight the Financing of Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 17 (2002) [hereinafter *Assessment of the Tools*] (statement of David D. Aufhauser, General Counsel, Department of the Treasury) (discussing "the importance of the war campaign against terrorist financing").

73. "Specifically, '[o]ur objective is . . . to follow the money trail, and dismantle entire financial networks and channels from moving money to finance terror.'" Daryl Shetterly, *Starving the Terrorists of Funding: How the United States Treasury Is Fighting the War on Terror*, 18 REGENT U. L. REV. 327, 327 (2006) (alteration in original) (quoting *Financial War on Terrorism: New Money Trails Present Fresh Challenges: Hearing Before the S. Comm. on Finance*, 107th Cong. 5 (2002)).

74. For a brief synopsis of this history, see Peter L. Fitzgerald, *"If Property Rights Were Treated Like Human Rights, They Could Never Get Away with This": Blacklisting and Due Process in U.S. Economic Sanctions Programs*, 51 HASTINGS L.J. 73, 88–110 (1999) [hereinafter Fitzgerald, *Property Rights*]. For a comprehensive description of U.S. use of embargoes and blacklists before 1998, see *id.* at 90–97; see also Peter L. Fitzgerald, *Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy*, 31 VAND. J. TRANSNAT'L L. 1 (1998) [hereinafter Fitzgerald, *Pierre Goes Online*].

75. In contrast to its current strategy, the U.S. government, like other governments, has previously used its financial leverage over foreign banks for more traditional financial reasons. For instance, it has conditioned financial market access to ensure financial soundness and stability of foreign banks. Other governments also use their market (though not financial) leverage over foreign firms for a range of more traditional regulatory goals. The European Union, for instance, uses its market leverage and regulatory capacity, along with other features, to shape unilaterally foreign rules regulating issues ranging from antitrust to public health. Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2012).

76. The government's definition of "U.S. persons" includes foreign branches. Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 925 (2009) ("'United States person' [includes] 'any United States citizen, permanent resident alien, entity organized under the law of the United States (including foreign branches), [and] any person in the United States.'") (citing Exec. Order No. 13,224, § 7, 3 C.F.R. 789 (2002)). In the exceptional cases of Cuba and North Korea, Treasury has defined U.S. persons to include foreign incorporated companies that are owned or controlled by U.S. persons. Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 20 U. PA. J. INT'L ECON. L. 61, 65 (1999); *see also* Meyer, *supra*, at 925 n.62. For an analysis of U.S. exercise of extraterritorial jurisdiction (by some definitions) through the regulation of U.S. parent-foreign subsidiary relationships, see Terrence J. Lau, *Triggering Parent Company*

government's reliance on general U.S. market power, particularly in international trade.[77] To ensure that U.S. persons do not use foreign entities to circumvent such embargoes, the government began to employ agency lists, such as Treasury's Specially Designated Nationals (SDN) List[78] or the State Department's Debarred List.[79] These lists target foreign actors as essentially "corporate cloaks" and prohibit U.S. entities from conducting business with them.[80] Beginning in the mid-1990s, the government—by executive order and congressional legislation—began to expand the purpose of these lists to create non-country-based programs targeting alleged terrorists and drug traffickers.[81]

The government has also used export controls, which restrict outgoing trade based on the identity of participating parties and the nature of the product.[82] Mirroring its

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Liability Under United States Sanctions Regimes: The Troubling Implications of Prohibiting Approval and Facilitation, 41 AM. BUS. L.J. 413 (2004).

77. For instance, the government has applied blanket trade embargoes on countries such as Angola, China, and Cuba. Fitzgerald, *Property Rights*, *supra* note 74, at 90–97.

78. This is an integrated list, currently 591 pages, containing more than 20,000 named individuals and companies that the government has deemed as posing some form of a threat to U.S. security. The list covers alleged terrorists, drug traffickers and WMD traffickers. Changes to the list are published in the Federal Register and in the form of email updates from the Department of the Treasury. *See* OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST (2014), *available at* http://www.treasury.gov/ofac/downloads/t11sdn.pdf [hereinafter SDN LIST].

79. This list contains the names of individuals and entities that have violated arms export control sanctions and are prohibited from exporting defense articles (including technical data) and defense services. *See* DIRECTORATE OF DEF. TRADE CONTROLS, U.S. DEP'T OF STATE, DEFENSE TRADE CONTROLS—LIST OF STATUTORILY DEBARRED PARTIES JULY 1988–NOVEMBER 2013 (2013), *available at* http://pmddtc.state.gov/compliance/documents/debar.pdf.

80. Fitzgerald, *Property Rights*, *supra* note 74, at 87. The government also freezes or blocks the entity's property via OFAC. *See Frequently Asked Questions and Answers Page 1*, U.S. DEPARTMENT TREASURY (Nov. 25, 2014), http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#18 ("Their assets are blocked and U.S. persons are generally prohibited from dealing with them.").

81. The first of these lists was established by a 1995 executive order directing the Treasury to target Colombian drug cartels. Peter L. Fitzgerald, *Drug Kingpins and Blacklists: Compliance Issues with US Economic Sanctions*, 4 J. MONEY LAUNDERING CONTROL 360, 365 (2001) [hereinafter Fitzgerald, *Drug Kingpins*]. Three days later, OFAC created the Specially Designated Narcotics Trafficker Program (SDNT). *See* OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, IMPACT REPORT: ECONOMIC SANCTIONS AGAINST COLOMBIAN DRUG CARTELS 1 (2007). Other noncountry lists created between the mid-1990s and 2000 targeted Middle East terrorists (beginning in 1995), governments that support terrorism (beginning in 1996), foreign terrorist organizations (beginning in 1997), traffickers in WMD (beginning in 1998), and narcotics traffickers (beginning in 2000). Fitzgerald, *Drug Kingpins*, *supra*, at 362.

82. Although export controls initially applied only to items being exported from the United States, the government has since extended them to U.S. nationals on foreign territory. This occurred with the enactment of the 1979 Export Administration Act. Gregory W. Bowman, *A Prescription for Curing U.S. Export Controls*, 97 MARQ. L. REV. 599, 611–14; Larry E. Christensen, *Unmasking the Myths*, TRADE & FORFAITING REV., Mar. 2008, at 44, 44–45 (2008). The Commerce Control List (CCL) includes items controlled for export or re-export by the Bureau of Industry and Security (BIS) subject to the export licensing authority of the BIS. 15 C.F.R. § 774 (2014).

use of agency lists to prevent U.S. persons from evading trade embargoes, the government has employed these lists to prohibit the exports of U.S. products from a non-U.S. country to a targeted country or entity—a policy known as "re-export controls."[83]

In a few rare but salient instances, the United States has tried to use these traditional economic tools with the primary purpose of influencing foreign private actors rather than U.S. persons. Each of these attempts to disrupt foreign transactions has largely failed. In the 1982 "pipeline case,"[84] for example, former President Ronald Reagan attempted to prohibit European subsidiaries of U.S. firms from supplying oil and gas equipment and technology to the Soviet Union as well as to prohibit non-U.S. firms and subsidiaries, which were using U.S.-licensed technology, from exporting equipment or technologies to Russia.[85] European governments protested vehemently, and U.S.-European relations quickly deteriorated.[86] Using General Secretary Leonid Brezhnev's death as pretext, Reagan retreated and lifted the re-export controls eleven months after he had first imposed them.[87]

In 1996, Congress enacted two pieces of legislation that similarly tried to influence the business calculus of foreign firms, albeit by different enforcement strategies. Congress passed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, better known as the Helms-Burton Act.[88] This legislation aims

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83. For a brief summary of re-export regimes for Cuba, Iraq, Iran, Libya, Sudan, and North Korea, see Clark, *supra* note 76, at 68–71. If a foreign party is found to have violated such a restriction, and even if the government cannot prosecute the foreign actor for lack of personal jurisdiction, it can still impose penalties either by placing the party on an agency list, which involves some form of market exclusion, or by holding—where possible—the U.S. parent company liable for the conduct of its foreign subsidiaries. John P. Barker & Michael E. Ginsberg, *Managing Compliance with U.S. Treasury Department OFAC Obligations: Even if Your Business Is Exclusively Outside the U.S.*, 5 GLOBAL TRADE & CUSTOMS J. 183, 184 (2010); *see also* Clark, *supra* note 76, at 71–72 (discussing the case of Fruehauf France).

84. *See generally* BRUCE W. JENTLESON, PIPELINE POLITICS: THE COMPLEX POLITICAL ECONOMY OF EAST-WEST ENERGY TRADE (Peter J. Katzenstein ed., 1986).

85. William S. Dodge, *The Helms-Burton Act and Transnational Legal Process*, 20 HASTINGS INT'L & COMP. L. REV. 713, 721–22 (1997); *see also* Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. 27,250 (June 24, 1982) (to be codified at 15 C.F.R. pts. 376, 379, 385); Reexport of technical data and exports of the product manufactured abroad by use of U.S. technical data, 47 Fed. Reg. 27,251 (June 24, 1982) (to be codified at 15 C.F.R. § 379.8).

86. *See* Kenneth W. Abbott, *Collective Goods, Mobile Resources, and Extraterritorial Trade Controls*, LAW & CONTEMP. PROBS., Summer 1987, at 117, 121; Homer E. Moyer, Jr. & Linda A. Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 LAW & POL'Y INT'L BUS. 1, 109–10 (1983). For more extensive analysis of the pipeline case, see JENTLESON, *supra* note 84.

87. Dodge, *supra* note 85, at 722; *see also* Bowman, *supra* note 82, at 638–39; Fitzgerald, *Pierre Goes Online*, *supra* note 74, at 70 n.320, 74 n.338.

88. The Helms-Burton Act was passed after Cuba shot down two unarmed airplanes flown by anti-Castro activists. Clark, *supra* note 76, at 72–73. This Act built on a 1992 law that prohibited foreign subsidiaries of U.S. companies from trading with Cuba. *Id.* For a concise discussion of these two pieces of legislation, see *id.* at 72–77.

exclusively at influencing foreign actors, as the government had already adopted an embargo prohibiting U.S. citizens and firms from doing business with Cuba.[89] Most controversially, the statute establishes a cause of action for any U.S. national against foreign individuals or entities deemed to be "trafficking" in U.S. property confiscated by Cuba after 1959, when Cuba first nationalized U.S.-owned firms (Title III), and it prohibits any alleged trafficker from entering the United States (Title IV).[90]

Less than five months later, Congress tried a slightly different legislative approach to shaping the business decisions of foreign firms. The Iran and Libya Sanctions Act[91] (later renamed the Iran Sanctions Act (ISA)) penalizes any foreign person or entity that invests more than twenty or forty million dollars in a given year in the energy sectors of Iran and Libya respectively.[92] Rather than rely on judicial enforcement as with Helms-Burton, the ISA requires the President to impose two of six possible sanctions on foreign entities that breach the treaty, limiting their access to the U.S. trade market.[93]

Foreign governments were outraged by both statutes. They filed diplomatic protests and legal claims against the United States at the World Trade Organization (WTO), and adopted blocking statutes directing domestic companies to disregard the U.S. statutes.[94] In response, the United States, while keeping the statutes formally on the books, retreated, and has refrained from enforcing either one.[95]

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89. Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001–6010 (2012); 31 C.F.R. § 515 (2014). The Cuba embargo was initially implemented in 1962 as a response to Cuba's illegal nationalization of U.S. property in Cuba. Cedric Ryngaert, *Extraterritorial Export Controls (Secondary Boycotts)*, 7 CHINESE J. INT'L L. 625, 636 (2008). In 1993, the United States expanded the embargo, prohibiting almost all property transactions by U.S. persons with Cuba. *Id.*

90. In fact, Helms-Burton goes even further, preventing the officers and shareholders of corporations that trafficked in the confiscated property from entering the United States. Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, § 401(a)(3), 110 Stat. 785, 822 (1996) (codified as amended at 22 U.S.C. § 6091 (2012)). The Act even prevents family members of those individuals from entering the United States. *Id.* § 401(a)(4).

91. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (codified as amended at 50 U.S.C. § 1701 (2012)).

92. The Iran and Libya Sanctions Act (ILSA) sought to limit Libya's and Iran's ability to finance the development of nuclear weapons programs or support terrorism and to pressure Libya into extraditing two suspects involved in the 1988 Lockerbie bombing. Ryngaert, *supra* note 89, at 639.

93. These sanctions include the following: denial of licenses to export products to a sanctioned party; denial of Export-Import Bank assistance regarding exports to a sanctioned party; for U.S. banks, prohibition of loans of more than $10 million to a sanctioned party; debarment of sanctioned parties from U.S. government contracts; import restrictions; and, for foreign financial institutions, denial of certain U.S. government banking privileges. Iran & Libya Sanctions Act § 6, 110 Stat. 1541, 1545.

94. Ryngaert, *supra* note 89, at 646–47.

95. The United States has not enforced Title III of the Act. *Id.* at 648 (noting that waivers for Title III have been continuously granted on a six-month basis and that Title IV has been enforced against only a few companies); *see also* KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS 25 (2014) [hereinafter KATZMAN, IRAN SANCTIONS 2014] ("No country has been designated a 'Country of Diversion Concern' [under Title III]."); Clark, *supra* note 76, at 91–92.

Since the 9/11 attacks, the government's strategy of influencing foreign private actors has undergone a profound shift. With the ultimate goal of isolating actors identified as national security threats, the government has begun to exploit its central position in global finance to induce foreign banks to follow U.S. security policy.[96] The government's shift in focus from restricting trade to emphasizing finance stems partly from its new understanding that the financial pipeline is a lifeline for terrorist activities and an "audit trail" for identifying terrorist networks.[97] In his statement to Congress in 2002, Department of the Treasury General Counsel David Aufhauser summarized the underlying logic of a policy that aimed at cutting the financial pipeline to terrorists: "You can stop the killing if you can stop the flow of money."[98] Explaining how tracking terrorist finance is more effective than conventional intelligence gathering, Aufhauser elaborated, "[B]ooks and records that are not intended for public oversight to [sic] do not lie; they are literally the diaries of the enterprise of terror."[99] He continued, "That is kind of a melodramatic statement, but I don't actually think it is possible to overstate the importance of the war campaign against terrorist financing."[100] In June 2005, President George W. Bush signed an executive order extending the dual focus on tracking and stopping money to counter the proliferation of WMD.[101] The Obama Administration has continued this two-prong policy.

Why would the government turn to foreign banks to cut off financial pipelines rather than simply rely on domestic banks or foreign governments? Sanctioning only the transactions of domestic banks likely would not suffice. Even if the United States and the European Union were to coordinate cutting their ties with a designated entity, a steady stream of finance and trade from other countries would likely fill the gap.[102] In this respect, traditional domestic sanctions are inevitably self-undermining.[103]

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96. The key difference between the government's past and current strategies is that the past strategy exercised general market power while the current strategy exercises financial power. *See infra* Part II.

97. *Assessment of the Tools*, *supra* note 72, at 17. Prior to the attacks, the Bush Administration had resisted calls for more banking regulations; its position shifted overnight. *See* Jesse S. Morgan, *Dirty Names, Dangerous Money: Alleged Unilateralism in U.S. Policy on Money Laundering*, BERKELEY J. INT'L L. 771, 771–72 (2003).

98. *Assessment of the Tools*, *supra* note 72, at 17. Treasury asserted, "[W]e also recognize that the fight against money laundering is integral to the war against terrorism, and that effective anti-money-laundering practices will save innocent lives." Peter Shields, *When the 'Information Revolution' and the U.S. Security State Collide: Money Laundering and the Proliferation of Surveillance*, 7 NEW MEDIA & SOC'Y 483, 484–85 (2005).

99. *Assessment of the Tools*, *supra* note 72, at 17. Others have described the task of tracking terrorist financing less optimistically. Chairman of the Senate Finance Committee Max Baucus describes the problem as "looking for a needle in a pile of needles." Shetterly, *supra* note 73, at 328.

100. *Assessment of the Tools*, *supra* note 72, at 17.

101. Exec. Order No. 13,382, 3 C.F.R. § 170 (2005). For an extensive discussion of the origins, structure, and application of Executive Order 13,382, see CarrieLyn Donigan Guymon, *The Best Tool for the Job: The U.S. Campaign to Freeze Assets of Proliferators and Their Supporters*, 49 VA. J. INT'L L. 849, 852–82 (2009).

102. Bradford & Ben-Shahar, *supra* note 56, at 389–90.

103. *See* Bryan R. Early, *Alliances and Trade with Sanctioned States: A Study of U.S.*

In theory, multilateral cooperation holds more promise than domestic action for placing sustained economic pressure on designated entities.[104] But for the same reasons that purely domestic sanctions are inadequate, multilateral agreements on sanctions tend to be elusive. This elusiveness is partly due to China's and Russia's veto power.[105] Even when the Security Council adopts resolutions, other governments may refrain from enforcing U.N. sanctions for strategic or political reasons or for sheer lack of capacity.[106] Legal scholar Jeffrey A. Meyer summarizes the shortcomings of the domestic and multilateral options succinctly: "U.N. sanctions are increasingly difficult to achieve and enforce, while unilateral sanctions are of diminishing effectiveness because of the capacity and willingness of third countries to do business with those that the United States shuns."[107]

The limitations of domestic and multilateral approaches apply also to U.S. attempts to follow illicit financial trails. If the U.S. government were to rely exclusively on domestic banks for its financial intelligence, it might not be able to track foreign transactions effectively. Designated actors, suspecting the limited reach of the United States in surveillance operations, could move their transactions to non-U.S. institutions. Relying on multilateral cooperation for intelligence is therefore important.[108] On its own, however, multilateralism too is inadequate: governments may be reluctant to hand over intelligence for political reasons, or they may simply move too slowly.[109]

The new strategy of dollar unilateralism responds to these limitations. It targets foreign banks, which have the potential to bridge the gap between domestic and multilateral approaches: harnessing foreign banks prevents designated actors from easily finding new sponsors or new venues for their illicit activities. Moreover, with the cooperation of foreign banks, the United States is less dependent on the cooperation of foreign governments and multilateral organizations. In theory at least, a Russian or Chinese veto of U.N. sanctions is a moot point if foreign banks—including those in Russia and China—are implementing U.S. policy.

The government may be drawn to foreign banks for other reasons. Foreign banks offer the same advantages as domestic private actors: better access to private information and reduced costs of enforcement.[110] They can also help limit access to both U.S. and foreign markets and, thus, to the global economy. Furthermore, as

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Economic Sanctions, 1950–2000, 56 J. CONFLICT RESOL. 547, 553 (2012).

104. *See generally* Navin Beekarry, *The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy: A Critical Analysis of Compliance Determinants in International Law*, 31 NW. J. INT'L L. & BUS. 137 (2011); Meyer, *supra* note 76.

105. *See* David E. Sanger & William J. Broad, *U.S. Sees Window to Pressure Iran on Nuclear Fuel*, N.Y. TIMES, Jan. 3, 2010, at A1; *see also* Linda Gerber-Stellingwerf, *Stalemate: A Short History of Sanctions Against Iran*, PEACE POL'Y, Jan. 26, 2010, at 4, *available at* http://peacepolicy.nd.edu/2010/01/26/stalemate-a-short-history-of-sanctions-against-iran.

106. *See* Eric Rosand, *Current Developments: The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 AM. J. INT'L L. 745, 760 (2004).

107. Meyer, *supra* note 76, at 924.

108. *But see* Arne Tostensen & Beate Bull, *Are Smart Sanctions Feasible?*, 54 WORLD POL. 373, 387 (2002) (discussing the ease by which targeted sanctions can be circumvented).

109. Robin Wright, *Stuart Levey's War*, N.Y. TIMES, Nov. 2, 2008, at MM29 [hereinafter Wright, *Stuart Levey's War*].

110. *See supra* text accompanying notes 28–30.

revolving doors to international commerce and capital, foreign banks provide a vast repository of international financial information that U.S. banks may lack.

II. THE TACTICS OF DOLLAR UNILATERALISM

To implement dollar unilateralism, the government has deployed three innovative, overlapping tactics: financial sticks, high-profile blacklists, and direct diplomacy.[111] The core purpose of each tactic is to influence foreign banks that have ties to the targeted actor, rather than to directly influence the target itself.[112] These tactics fall along a continuum of legal formality, both in their source of authority (whether or not the government's tactics are precisely enumerated) and content (whether or not the government's tactics impose binding obligations).

The government's first tactic, and its most direct exercise of financial power, is to wield financial sticks as a way to influence foreign banks to cut ties with targeted actors. Financial sticks are formal in both source and content: they are explicitly established by statute, executive order, or agency regulation, and they impose legally binding requirements on actors under U.S. jurisdiction. Although these sticks come in numerous forms—typically referred to by the summary concept of sanctions[113]—the primary one entails restricting or denying foreign banks' access to the U.S. financial market if the banks continue to do business with targeted actors.[114]

Second, the government, specifically Treasury, uses high-profile blacklists to pressure foreign banks, including those without U.S. ties, to limit business with targeted entities. As defined in this Article, high-profile blacklists entail the simple act of naming—in a highly publicized way—targeted financial entities and jurisdictions without any follow-up action. Treasury, more specifically the Financial Crimes Enforcement Network (FinCEN), uses high-profile blacklists as the first step of a section 311 action under the Patriot Act. It issues a formal regulatory finding and notice of proposed rulemaking warning that an entity

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111. I adopt W. Michael Reisman and Monica Hakimi's definition of "unilateralism" as acting outside formal legal processes, without the structured oversight of any external actor. *See* Hakimi, *supra* note 5, at 111 (citing Reisman, *supra* note 5, at 3). As Hakimi elaborates, "The legal system's formal processes are typically structured so that multiple states consent to or oversee a decision." *Id.*

112. *See, e.g.*, Simon Tisdall, *U.S. Financial Squeeze on Iran Yields Results*, GUARDIAN (U.K.), Feb. 12, 2007, http://www.guardian.co.uk/commentisfree/2007/feb/13/tisdallbriefing.world ("Where direct U.S. regulatory enforcement is impossible, as with European businesses trading with Iran, American political, diplomatic and other pressures are proving to be almost equally effective.").

113. This Article avoids the terminology of "sanctions," since it tends to obscure differences among various types of sanctions and also creates terminological confusion. For instance, some scholars and policy makers would claim that the denial of correspondent banking to a third-party firm is not a sanction at all, but simply a regulatory condition that foreign parties can choose to follow or ignore. Other scholars and policy makers refer to correspondent banking restrictions using diverse terms including sanctions, sectoral sanctions, secondary sanctions, and triadic sanctions.

114. To be sure, the government frequently conditions access to the U.S. financial market (or uses some other financial stick) based on financial policies, such as ensuring adequate capitalization. It has not done so in pursuit of national security.

constitutes a "primary money laundering concern," but does not require U.S. actors to take any action. High-profile blacklists are thus semiformal given their delineation under the Patriot Act but nonbinding nature. After it blacklists an entity, Treasury may proceed to the second step and adopt a final rule that directs U.S. banks to take certain "special measures," such as closing correspondent accounts with the listed entity. Even when Treasury officials refrain from using such financial sticks at the second step, they anticipate that the simple act of naming an entity may encourage foreign banks to cut their ties.[115] Foreign banks may do so to protect their market access (in case the government eventually imposes legal measures) and to preserve their reputations.[116]

Finally, Treasury officials have turned to what appears to have been an unprecedented campaign of "direct diplomacy," systematically holding meetings directly with foreign bank executives in addition to their meetings with foreign government officials. Direct diplomacy covers a broad range of practices: traveling abroad, sharing information, applying implicit pressure, using moral suasion, and appealing to professional or social identities. This tactic is legally informal because it is not explicitly enumerated by statute or executive order and does not impose direct legal obligations on participants.[117]

The United States is able to deploy these three tactics because it is at the center of global financial markets. As the world's leading reserve currency,[118] the dollar accounts for more than sixty percent of the reserves of foreign central banks.[119] The dollar is the most important international reference currency, and it is in high demand for stabilizing national currencies.[120] Moreover, the dollar is the leading currency of cross-border exchange, including foreign trade, foreign-exchange trading, and international bond transactions.[121] Importantly, the Federal Reserve clears all transactions in U.S. dollars. This means that if they do not have offices in the United States, foreign banks will usually hold correspondent or payable-through accounts with U.S. banks in order to preserve their access to U.S. currency.[122]

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115. *See infra* text accompanying notes 199–203.

116. I follow the literature in this area in conceptualizing reputational concerns as market based, without denying the possibility that sociocultural and professional aspects of reputation may also be in play. *See, e.g.*, Judith van Erp, *Naming and Shaming in Regulatory Enforcement*, *in* EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 322, 323 (Christine Parker & Vibeke Lehmann Nielsen eds., 2012) (describing three aspects of firm reputation that motivate compliance).

117. *See* Exec. Order No. 13,382, § 6, 3 C.F.R. 172 (2006); Exec. Order No. 13,224, § 7, 3 C.F.R. 789 (2002).

118. JUAN C. ZARATE, TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE 424 (2013) [hereinafter ZARATE, TREASURY'S WAR] ("This [financial] power relies on . . . the centrality of the United States as a financial center, and maintenance of the dollar as the world's preferred reserve currency."); *see also* BARRY EICHENGREEN, EXORBITANT PRIVILEGE: THE RISE AND FALL OF THE DOLLAR AND THE FUTURE OF THE INTERNATIONAL MONETARY SYSTEM (2011).

119. Alan Wheatley, *Introduction* to THE POWER OF CURRENCIES AND CURRENCIES OF POWER 11–12 (Alan Wheatley ed., 2013) [hereinafter POWER OF CURRENCIES].

120. *See id.* at 10.

121. *Id.* at 12.

122. Foreign banks establish correspondent accounts with U.S. banks so that the U.S.

The dominance of U.S. currency gives the U.S. government "the power to persuade and coerce."[123] At any moment, the government can choose to cut off a foreign bank's access to U.S. financial markets and thus push it to the periphery of global trade and finance.[124] The government does so either by suspending a foreign bank's license to operate in the United States or by directing U.S. banks to shut down their correspondent and payable-through accounts for the foreign bank. This is, in effect, a death penalty for foreign banks. As David Cohen, Treasury's Under Secretary for Terrorism and Financial Intelligence, explains,

> For banks and businesses around the world, if they don't have access to the U.S. financial system, don't have access to the U.S. economy, it is a significant if not mortal wound. That gives us a huge amount of leverage, a huge amount of opportunity to project U.S. power through our financial measures.[125]

Foreign banks have been responsive to the government's dollar unilateralism. They appear to have cooperated for a mix of reasons: to preserve access to the U.S. financial market, to protect their reputations within the international banking industry, and to defend social and professional norms. This is not to deny the existence of important exceptions; these harnessing tactics do not work all the time. The analysis below suggests both how the government succeeds in enlisting the cooperation of foreign banks and how such tactics can at times be derailed.

In exploring dollar unilateralism, this Part draws on three cases. It first describes the government's use of financial sticks to indirectly (through regulating U.S. banks) pressure foreign banks to cut their ties to Iran. It then discusses how the government has attempted to discourage foreign bank transactions with North Korea by employing high-profile blacklists. And finally, it details the government's reliance on direct diplomacy for intelligence gathering and securing foreign banks' cooperation with U.S. policies, drawing respectively on the examples of SWIFT and Iran. The discussion concludes with a brief consideration of whether these tactics have proven effective.

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bank may act on their behalf, receiving deposits from the foreign bank, making payments, and engaging in other financial transactions. Foreign banks establish payable-through accounts at U.S. banks in order to grant their foreign customers access to the U.S. banking system. Barry E. Carter & Ryan M. Farha, *Overview and Operation of U.S. Financial Sanctions, Including the Example of Iran*, 44 GEO. J. INT'L L. 903, 906 n.20 (2013). For further explanations of correspondent and payable-through banking, see 31 U.S.C. § 5318A(b) (2012); Press Release, U.S. Dep't Treasury, Fact Sheet: Overview of Section 311 of the USA Patriot Act (May 22, 2012), *available at* http://www.treasury.gov/press-center/press-releases/Pages/tg1591.aspx.

123. Alan Wheatley, *The Origins and Use of Currency Power*, *in* THE POWER OF CURRENCIES AND CURRENCIES OF POWER 17, 19 (Alan Wheatley ed., 2013).

124. *Id.* at 11.

125. William Mauldin, *U.S. Treasury's Top Terrorism Cop: How Financial Tools Fight Foes*, WALL ST. J. (June 2, 2014, 7:06 AM), http://blogs.wsj.com/washwire/2014/06/02/u-s-treasurys-top-terrorism-cop-how-financial-tools-fight-foes.

A. Financial Sticks

Using its financial leverage, the United States is able to convince foreign banks to limit or cut ties with designated actors.[126] It does this primarily by requiring U.S. banks to limit or close accounts with foreign banks that do not adhere to U.S. policy. This financial stick is powerful in that, even when the U.S. lacks adjudicative jurisdiction over a foreign party, the government is able to penalize the foreign party through directing U.S. companies to refrain from engaging in business with it.[127]

The financial-sticks tactic is exemplified by the American efforts to isolate Iran. Since the mid-1990s, the government has sought to stop Iran's development of its nuclear program and its support of terrorist groups.[128] Following the 2005 election of President Mahmoud Ahmadinejad and the announcement that Iran was resuming its uranium enrichment and conversion program, the United States stepped up its policy of isolation.[129] As part of this initiative, the government deployed three types of financial sticks: refusing to clear transactions in U.S. dollars, cutting off access to the U.S. financial market, and imposing financial penalties on foreign banks that violate U.S. rules.

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126. Although not discussed here, the government uses financial sticks as a tactic to follow financial trails as well. For instance, under the Patriot Act, the U.S. government may require a foreign bank with a correspondent account in the United States to hand over financial data located abroad. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 311, 115 Stat. 272, 298 (codified as amended at 31 U.S.C. § 5318A (2012)). If the foreign bank refuses, the government can require U.S. banks to close its correspondent accounts for the foreign bank. *See id.*; *see also* BENN STEIL & ROBERT E. LITAN, FINANCIAL STATECRAFT: THE ROLE OF FINANCIAL MARKETS IN AMERICAN FOREIGN POLICY (2008) (discussing targeted financial measures to curb Iran's and North Korea's nuclear programs).

127. The government's reliance on such agency measures (sometimes called administrative sanctions) is longstanding in the area of trade and has been a powerful tool. As Peter L. Fitzgerald explains, "If the parties to an unapproved re-export are unaffiliated with the United States and therefore beyond U.S. jurisdiction for enforcement purposes, the re-export provision nevertheless provides a basis for the United States to assert that a violation of its controls has occurred. It can then proceed to administratively sanction those involved with the violation by naming them to the State Department's Debarred List or the Commerce Department's DPL, even though they are otherwise beyond the reach of other U.S. enforcement processes." Fitzgerald, *Pierre Goes Online*, *supra* note 74, at 43. Treasury's employment of such measures in the financial (as opposed to trade) sector, however, is new—at least as a national security strategy.

128. *See generally* Quinton Cannon Farrar, Comment, *U.S. Energy Sanctions and the Race to Prevent Iran from Acquiring Weapons of Mass Destruction*, 79 FORDHAM L. REV. 2347, 2353–64 (2011).

129. Rachel L. Loeffler, *Bank Shots: How the Financial System Can Isolate Rogues*, FOREIGN AFF., Mar./Apr. 2009, at 101, 105. Both Congress and the U.N., for instance, were beginning to adopt more aggressive policies toward Iran. Two weeks after the first Treasury designation of an Iranian bank, Congress adopted the Iran Freedom Support Act, Pub. L. No. 109-293, 120 Stat. 1344 (2006) (codified at 50 U.S.C. § 1701 (2012)), which amended a previous statute to include sanctions for supporting Iran's WMD program.

The government's first financial stick in the context of its Iran policy was relatively modest and involved the ad hoc withdrawal and eventually full retraction of U-turn exemptions involving Iranian banks. U-turn payments occur when U.S. banks clear transactions between foreign banks, converting foreign currency into U.S. currency.[130] In 1995, OFAC established a U-turn exemption to the Iran embargo, which allowed U.S. banks to process transactions for Iranian entities as long as U.S. banks did not directly credit or debit an Iranian account.[131] U.S. officials had decided to permit U-turn payments in order to maintain the primacy of U.S. currency in the global oil market.[132] Without such an exemption, they feared that parties might shift to a different currency rather than limit their transactions with Iran.[133]

In 2006, Treasury began to prohibit U.S. banks from performing U-turn transactions that involved specific Iranian banks. Under the leadership of Stuart Levey, then-Under Secretary for Terrorism and Financial Intelligence, Treasury first prevented U-turns from being performed for transactions with Bank Saderat, one of Iran's largest state-owned banks.[134] Treasury targeted this bank based on allegations that it had transferred funds to Hezbollah and other U.S.-designated terrorist groups.[135] The Saderat U-turn prohibition made it substantially more difficult for foreign banks to do business with the bank. By closing this loophole, Treasury calculated that foreign banks would decide that it would be too burdensome to maintain business with Bank Saderat.[136] Over the next two years, Treasury withdrew the U-turn exemption for an increasing number of large Iranian banks.[137] At

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130. FEAVER & LORBER, *supra* note 14, at 37.

131. Matthew Levitt, *The Iran Primer: Financial Sanctions*, U.S. INST. PEACE, http://iranprimer.usip.org/sites/iranprimer.usip.org/files/Financial%20Sanctions.pdf.

132. The other reason for the exemption was that the State Department wanted to prevent backlash to U.S. sanctions by its allies who were engaged in business with Iran and would have found the sudden inability to convert to U.S. currency seriously disruptive. *See* Brett Wolf, *U-Turns: The History Behind the Loophole That Snared Standard Chartered*, THOMSON REUTERS, Aug. 20, 2012 (unpublished article on file with the Indiana Law Journal).

133. *See id.*

134. *See* Iranian Transactions Regulations, 71 Fed. Reg. 53,569, 53,570 (Sept. 12, 2006) (to be codified at 31 C.F.R. § 560.516); Press Release, U.S. Dep't Treasury, Treasury Revokes Iran's U-Turn License, HP-1257 (Nov. 6, 2008), *available at* http://www.treasury.gov/press-center/press-releases/Pages/hp1257.aspx [hereinafter Treasury Revokes Iran's U-Turn License].

135. Glenn Kessler, *U.S. Moves to Isolate Suspect Iranian Banks*, WASH. POST, Sept. 10, 2006, at A17. The authority for OFAC to take such a measure was granted by Executive Order 13,224. Exec. Order No. 13,224, § 7, 3 C.F.R. 789 (2002).

136. *See* Danforth Newcomb, *Non-U.S. Banks Are Target of Recent Economic Actions by U.S. Government*, 125 BANKING L.J. 468, 469 (2008) ("Although banks with no presence in the United States are not bound by U.S. economic sanctions, these recent OFAC actions also impose indirect burdens on non-U.S. financial institutions engaging in certain transactions with these Iranian banks.").

137. In January 2007, Treasury, specifically OFAC, named Bank Sepah and its wholly owned subsidiary incorporated in the United Kingdom, Bank Sepah International PLC. *See generally* Exec. Order No. 13,382, § 6, 3 C.F.R. 172 (2006) (providing the legal means by which naming occurs). *See also* Kittrie, *supra* note 9, at 806; John F. Cooney, *Targeted Financial Sanctions*, ADMIN. & REG. L. NEWS, Winter 2009, at 8, 8; Tisdall, *supra* note 112

the end of 2008, Treasury revoked its authorization of U-turn transactions for Iranian banks entirely.[138]

In 2010, the government's use of financial sticks to shape foreign bank incentives took a more aggressive turn. Rather than simply make transactions between Iran and third parties more difficult, the government began to force foreign banks to choose between maintaining ties to certain designated entities and protecting their access to U.S. banks. The shift in strategy and turn to its second type of financial stick was prompted by a number of Iranian actions, including Iran's admission in September 2009 that it had built a secret underground uranium enrichment plant.[139]

The initial move to step up financial pressure came from Congress and the President, not Treasury. Congress enacted the 2010 Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA),[140] which lawyers at one U.S. law firm describe as marking "a sea-change in the breadth and severity of economic sanctions against Iran."[141] Specifically, section 104 of the Act seeks to deter foreign

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("[T]he U.S. treasury and associated agencies have been spinning an expanding, entangling web of unilateral sanctions and other punitive measures around Iran's financial institutions and commercial enterprises."); Juan C. Zarate, *Harnessing the Financial Furies: Smart Financial Power and National Security*, WASH. Q., October 2009, at 43, 53 [hereinafter Zarate, *Harnessing the Financial Furies*].

138. Iranian Transactions Regulations, 73 Fed. Reg. 66,541 (Nov. 10, 2008) (amending various provisions of 31 C.F.R. pt. 560); Treasury Revokes Iran's U-Turn License, *supra* note 134.

139. Ian Traynor & Julian Borger, *Iran Admits Secret Uranium Enrichment Plant*, GUARDIAN (U.K.), Sept. 25, 2009, http://www.theguardian.com/world/2009/sep/25/iran-admits-uranium-plant. The strategy shift was also in response to Iran's test-firing long-range missiles a few weeks later and its backpedaling from a tentative agreement to a proposed enriched uranium deal. *Iran Test-Fires Long-Range Missiles*, CNN (Sept. 28, 2009, 11:35 PM), http://www.cnn.com/2009/WORLD/meast/09/28/iran.missile.tests/index.html. The deal would have required Iran to transfer seventy-five percent of its enriched uranium for processing by other countries. David Blair, *Iran Pulls Back from Deal on Uranium Enrichment*, TELEGRAPH (U.K.), Oct. 19, 2009, http://www.telegraph.co.uk/news/worldnews/middleeast/iran/6376902/Iran-pulls-back-from-deal-on-uranium-enrichment.html. Although Obama continued to press Iran to agree to the uranium-transfer deal, he abandoned that effort after Iran announced, in February 2010, the decision to begin enriching its uranium stockpile. *See* Alan Cowell & Thom Shanker, *Iran's Enrichment Plans Prompt New Sanction Calls*, N.Y. TIMES, Feb. 9, 2010, at A6. Other factors also pushed the Obama Administration and Congress in the direction of harsher measures, including pressure from Israel and a desire to signal to other governments in the region that they would not need to begin their own nuclear buildup. *See* Mark Landler, *U.S. Is Seeking Tougher Tactics Against Iran*, N.Y. TIMES, Sept. 28, 2009, at A1; *see also* Isabel Kershner, *Israel Voices Unease over Iran Deal*, N.Y. TIMES, Oct. 23, 2009, at A14; David E. Sanger & Eric Schmitt, *U.S. Speeding up Missile Defenses in Persian Gulf*, N.Y. TIMES, Jan. 31, 2010, at A1.

140. Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, 124 Stat. 1312 (2010) (codified at 22 U.S.C. § 8501 (2012)). Obama signed it into law on July 1, 2010. CISADA amended the Iran Sanctions Act, which replaced the ILSA in 2006, following Libya's renunciation of terrorism and WMD. *See* KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS 1–2, 4–5, 5 n.5 (2010).

141. Anthony Rapa, Amy J. Lentz, Peter Edward Jeydel, Edward J. Krauland & Meredith Rathbone, *U.S. Sanctions on Iran: 2012 Year in Review*, STEPTOE & JOHNSON LLP (Feb. 25,

banks from dealing with the Iranian government (including Iran's Revolutionary Guard) and other entities allegedly facilitating the development of Iran's WMD program or supporting terrorism, including those entities sanctioned by the U.N. or designated by prior executive orders.[142] It does so primarily by empowering the Executive with a severe financial stick: the authority to deny foreign banks access to the U.S. financial market.[143] If Treasury (specifically OFAC) issues a finding that a foreign bank has knowingly conducted business with U.S.-designated actors, it places the foreign bank on the "Part 561 List" and imposes strict conditions on or forbids U.S. banks from opening or maintaining a correspondent or payable-through account for that foreign bank.[144] Although such findings and Part 561 listings are exceedingly rare,[145] the sheer threat of them is a powerful deterrent.[146]

Congress deployed what is arguably its harshest financial stick in 2012, placing unprecedented pressure on both foreign banks and foreign oil companies. The central banking-related provisions enacted in the National Defense Authorization

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2013), http://www.steptoe.com/publications-pdf.html/pdf/?item_id=8648.

142. These entities include parties that directly facilitate or engage in money laundering to facilitate Iran's acquiring of WMD or support for terrorism, parties subject to U.N. financial sanctions, and parties that facilitate transactions or provide significant financial services for Iran's Revolutionary Guard Corps or affiliates, or any party whose assets are blocked in connection with Iran's proliferation of WMD or support for international terrorism. *See* 22 U.S.C. § 8513(c)(2) (2012). OFAC issued the Iranian Financial Sanctions Regulations (implementing this CISADA provision) in August 2010. *See* 31 C.F.R. § 561.201 (2012) (updated since ITRA was enacted); *see also* Rapa et al., *supra* note 141. Executive Orders 13,224 and 13,382 authorize OFAC to block property of those who have committed or are at risk of committing terrorism and those who assist in the proliferation of WMD. Exec. Order No. 13,224, § 7, 3 C.F.R. 789 (2002) (terrorism); Exec. Order No. 13,382, § 6, 3 C.F.R. 172 (2006) (WMD proliferation).

143. In targeting foreign banks, Congress sought to undermine Iran's economy by preventing Iranian businesses from being able to acquire letters of credit that are necessary for transactions with foreign businesses. KATZMAN, IRAN SANCTIONS 2014, *supra* note 95, at 27. CISADA also sought to isolate Iran by: (1) stepping up pressure on foreign oil companies by expanding the scope of activity proscribed by the 1996 Iran Sanctions Act, and (2) using a broad definition of "equipment and services" to prohibit the supply of refined petroleum and refining equipment or services by foreign or domestic persons. *See Developments in the Law—Extraterritoriality*, 124 HARV. L. REV. 1226, 1250–51 (2011).

144. 31 C.F.R. § 561.201 (2014). These restrictive conditions include: (1) prohibiting or restricting any provision of trade finance; (2) restricting transactions processed through the accounts; (3) placing monetary or volume limits on the transactions processed through the accounts; (4) requiring preapproval from the U.S. financial institution for all transactions processed through the accounts; or (5) prohibiting or restricting the processing of foreign exchange transactions through the account. § 561.201(b).

145. Only four institutions have ever been sanctioned under Part 561. The Part 561 List has not been updated since May 17, 2013, when Elaf Islamic Bank was removed. *See* OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, THE LIST OF FOREIGN FINANCIAL INSTITUTIONS SUBJECT TO PART 561 (THE PART 561 LIST) (2013), *available at* http://www.treasury.gov/ofac/downloads/561list.pdf.

146. *See supra* text accompanying note 122. CISADA also mandated that U.S. banks and other financial institutions be penalized under the International Emergency Economic Powers Act (IEEPA) if they know, or should have known, that their foreign-owned or controlled subsidiaries had engaged in prohibited transactions with Iran. *See* 22 U.S.C. § 8513(d) (2012).

Act of 2012 (NDAA) prohibit U.S. banks from establishing new correspondent and payable-through accounts and require them to severely restrict existing accounts with any foreign bank that knowingly engages in transactions with the Central Bank of Iran (CBI) or any designated Iranian bank.[147] The provisions also forbid U.S. banks from maintaining such accounts for banks, including foreign central banks and state-owned or controlled banks, domiciled in a country that sells or purchases petroleum to or from Iran.[148]

In August 2012, President Obama also signed into law the Iran Threat Reduction and Syria Human Rights Act (ITRA), which extends designations to new entities and codifies a 2012 executive order that imposed correspondent banking restrictions on foreign banks engaged in business with two Iranian petroleum companies.[149] In addition, building on the 2010 banking provisions of CISADA, the ITRA imposes liability on U.S. parent companies of foreign-owned or controlled subsidiaries that conduct any transactions with Iran.[150] The ITRA increases the number of sanctions the President is required to impose from CISADA's three of nine to at least five of twelve.[151]

Finally, the Iran Freedom and Counter-Proliferation Act of 2012, a component of the 2013 National Defense Authorization Act, requires Treasury to take specific measures against any foreign bank that facilitates "significant financial" transactions with Iran's energy, shipping, and shipbuilding sectors.[152] These measures include requiring U.S. banks to cut off correspondent banking relations. President Obama followed up with a 2013 executive order that, for the first time, sanctions persons engaging in any "significant transaction" involving Iran's currency, the rial.[153]

These financial sticks appear to have influenced foreign bank calculations because they force a stark and costly choice between U.S. and Iranian markets. The sheer complexity of the sanction regime may have exerted an additional deterrent effect: seeking to avoid the laborious task of having to determine their compliance with U.S. laws and regulations, foreign banks refrain from creating any new ties with Iran, even for legitimate activity. As one U.S. lawyer asserts, "Because entities in Dubai and Abu Dhabi do not necessarily have expertise and sophistication in respect of US laws, this

147. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1245, 125 Stat. 1298, 1647–50 (2012) (codified at 22 U.S.C. § 8513a (2012)).

148. 22 U.S.C. § 8513a(d)(4) (2012); *see also* Rapa et al., *supra* note 141.

149. Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA), Pub. L. No. 112-158, 126 Stat. 1214 (2012) (codified at 22 U.S.C. § 8701 (2012)).

150. 22 U.S.C. § 8725 (2012).

151. These twelve sanctions include, inter alia: prohibiting U.S. persons from investing in or purchasing significant quantities of equity or debt; prohibiting the U.S. government from contracting with a sanctioned entity; prohibiting transfers or payments between financial institutions involving any interest in a sanctioned entity, where the transfers or payments are subject to U.S. jurisdiction; and prohibiting most transactions of property in which a sanctioned entity has interest that is in U.S. jurisdiction. 50 U.S.C. § 1701 note (2012).

152. 22 U.S.C. § 8803(d) (2012); *see also* Rapa et al., *supra* note 141.

153. Exec. Order No. 13,645, 78 Fed. Reg. 33,945 (June 3, 2013). The executive order permits the Treasury to prohibit the opening of, or put strict conditions on maintaining, a payable-through or correspondent account by the financial institution and to block all of the financial institution's interests in property in the United States. *Id.* § 1(b).

just adds a layer of confusion and fear . . . . That itself can lead to companies . . . avoiding any kind of Iran business out of fear of possibly getting into trouble in the US."[154]

Finally, as its third financial stick, the United States has imposed or threatened to impose significant fines on foreign banks that violate U.S. laws and regulations prohibiting business with Iran or Iranian entities.[155] For instance, in 2009, Treasury reached a $536 million settlement with Credit Suisse for facilitating transactions for Iran.[156] In 2012 and 2013, partly due to violations of the Iranian sanctions regulations, the Dutch bank ING,[157] British bank Standard Chartered,[158] and British bank HSBC[159] agreed to settlements of $619 million, $340 million, and $1.9

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154. Colin Simpson, *UAE Businesses to Feel Effect of Fresh US Sanctions on Iran*, NATIONAL (U.A.E.) (July 3, 2013), http://www.thenational.ae/news/uae-news/uae-businesses-to-feel-effect-of-fresh-us-sanctions-on-iran (quoting Farhad Alavi, a partner at the Akrivis Law Group) (internal quotation marks omitted). Another U.S. law firm describes the deterrent effect of the increasingly complex legal landscape in these terms:

> Because these [rules] at times seem almost purposefully confusing, many non-U.S. financial institutions are carefully scrutinizing business because of the mere possibility, however remote, that an attenuated Iranian interest in a transaction would expose the bank to sanctions, possibly to a significant fine, and to adverse publicity. *The strongest impact of these sanctions may be their mere existence rather than their exercise, as highly-regulated and risk-averse financial institutions steer well clear of the line.*

Sean M. Thornton, *Iran, Non-U.S. Banks, and Secondary Sanctions: Understanding the Trends*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Oct. 24, 2012), http://www.skadden.com/sites/default/files/publications/Iran_Non-US_Banks_and_Secondary_Sanctions_0.pdf (emphasis added).

155. *See* KATZMAN, IRAN SANCTIONS 2014, *supra* note 95, at 27.

156. Claudio Gatti & John Eligon, *Iranian Dealings Lead to a Fine for Credit Suisse*, N.Y. TIMES, Dec. 16, 2009, at B1.

157. ING was charged with concealing $1.6 billion in illegal transactions with Iranian and Cuban clients, in violation of IEEPA, 50 U.S.C. §§ 1701–1706 (2012), and the Trading With the Enemy Act (TWEA), 50 U.S.C. app. §§ 1–44 (2012). DEP'T OF THE TREASURY, MUL-565595, SETTLEMENT AGREEMENT (2012), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/06122012_ing_agreement.pdf; s*ee also* Annie Lowrey, *ING Bank to Pay $619 Million to Settle Inquiry into Sanctions Violations*, N.Y. TIMES, June 13, 2012, at B3; Karen Freifeld, *ING to Pay $619 Mln over Cuba, Iran Sanctions*, REUTERS, June 12, 2012, *available at* http://www.reuters.com/article/2012/06/12/ing-sanctions-idUSL1E8HC5Q420120612.

158. Standard Chartered was charged with concealing nearly 60,000 transactions with Iranian clients over ten years, involving at least $250 billion and generating hundreds of thousands of dollars in fees, in violation of IEEPA, 50 U.S.C. §§ 1701–1706 (2012), and the Foreign Narcotics Kingpin Designation Act (FNKDA), 21 U.S.C. §§ 1901–1908 (2012). DEP'T OF THE TREASURY, MUL-607200, SETTLEMENT AGREEMENT (2012), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121210_SCB_settlement.pdf; s*ee also* David Benoit, *Standard Chartered's Fine Tally Runs to $667 Million*, WALL ST. J. (Dec. 10, 2012, 11:15 AM), http://blogs.wsj.com/deals/2012/12/10/standard-chartereds-fine-tally-runs-to-667-million; Karen Freifeld & Carrick Mollenkamp, *Standard Chartered Reaches $340 Mln Settlement over Iran*, REUTERS, Aug. 14, 2012, *available at* http://www.reuters.com/article/2012/08/14/standardchartered-probe-idUSL6E8JE3QK20120814.

159. HSBC was charged with processing 203 electronic transactions totaling more than

billion, respectively. In 2014, the United States imposed its largest fine to date: $8.9 billion on the French bank BNP for its violations of sanctions on Iran (as well as Sudan and Cuba).[160]

These settlements suggest that, at least until these penalties were imposed, the government's financial sticks were not sufficient to deter some of the leading global banks from sweeping breaches of the Iran sanctions regime. For years on end, these banks flagrantly violated these regulations by conducting illicit transactions with Iran. They likely calculated that the profits from illicit transactions outweighed the risks and costs of getting caught.

Yet it would be mistaken to assume that evidence of violations means that the use of financial sticks has had no effect. Aggregate economic data, some specific to banks, suggest that banks were indeed limiting their ties with Iran, even as these violations were ongoing.[161] The true test of the use of financial sticks against the largest global banks is still ahead, and turns on whether such banks are, in light of the recent heavy penalties and restrictions on operations, newly motivated to comply with U.S. regulations.[162]

B. High-Profile Blacklists

In advancing its security agenda, the U.S. government has, to a more limited extent, also harnessed foreign banks by means that are less explicitly coercive than using financial sticks: employing high-profile blacklists. The government uses many forms of blacklists (or designations) for national security reasons, the most frequent and well known being the SDN List.[163] This Article focuses on a different type of blacklist, which it terms "high-profile blacklists."[164] In this much more

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$164 million with Iran, in violation of IEEPA, 50 U.S.C. §§ 1701–1706 (2012), and the TWEA, 50 U.S.C. app. §§ 1–44 (2012). Deferred Prosecution Agreement, United States v. HSBC Bank, (E.D.N.Y. Dec. 11, 2012) (Cr. No. 12-763); DEP'T OF THE TREASURY, MUL-615225, SETTLEMENT AGREEMENT (2012), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121211_HSBC_Settlement.pdf; *see also* Ben Protess & Jessica Silver-Greenberg, *Bank Said to Avoid Charges over Laundering*, N.Y. TIMES, Dec. 11, 2012, at A1; Kevin Scura, *HSBC and Money Laundering: "Too Big To Indict*,*"* AM. CRIM. L. REV. (Feb. 15, 2013), http://www.americancriminallawreview.com/aclr-online/hsbc-and-money-laundering-too-big-indict.

160. Press Release, U.S. Dep't Treasury, Treasury Reaches Largest Ever Sanctions-Related Settlement with BNP Paribas SA for $963 Million (June 30, 2014), *available at* http://www.treasury.gov/press-center/press-releases/Pages/jl2447.aspx.

161. *See infra* Part II.B; *see also* KENNETH KATZMAN, CONG. RESEARCH SERV., RS 20871, IRAN SANCTIONS 53–56 (2013) [hereinafter KATZMAN, IRAN SANCTIONS 2013]; Steven R. Weisman, *Pressed by U.S., European Banks Limit Iran Deals*, N.Y. TIMES, May 22, 2006, at A1; Laurence Norman, *Swift to Cut Ties with Iran Banks After EU Ban,* WALL ST. J., Mar. 14, 2012, http://online.wsj.com/news/articles/SB10001424052702303863404577283532862521716.

162. Still, these types of restrictions are, to at least some degree, inevitably self-busting: the more actors adhere to them, the greater the gain for any one actor who decides to violate them.

163. SDN LIST, *supra* note 78.

164. High-profile blacklists differ from SDN blacklists (or SDN designations) in two respects. First, they are high profile partly because they are relatively rare. These blacklists thus are well-recognized events in the finance community. For instance, newspapers are much more likely to report blacklisting under section 311 than an SDN designation. *See,*

salient blacklist, Treasury issues (under section 311 of the Patriot Act) a finding and notice of rulemaking that a foreign jurisdiction or foreign bank is a "primary money laundering concern."[165] It engages in this high-profile targeting with the goal of influencing other actors—here both domestic and foreign banks—to break ties with the blacklisted entity. High-profile blacklists can be considered semiformal because, despite their explicit congressional authorization, Treasury does not impose legal obligations on U.S. actors at the time of its blacklisting. It may, but is not required to, follow up a blacklisting by issuing a final ruling directing U.S. banks to take one or more of five "special measures" against the blacklisted institution, such as heightened due diligence or closing correspondent accounts.[166] But even when it refrains from using these financial sticks, the government anticipates that foreign banks may abandon business with the blacklisted entity in order to preserve their market access[167] or protect their reputational standing, particularly with other banks.[168] As Juan Zarate, former Deputy National Security Adviser for Combating Terrorism, explained, section 311 enabled Treasury to put targeted banks under the global spotlight and "make them radioactive to reputation-conscious banks worldwide."[169]

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e.g., Rachel Louise Ensign, *FBME Bank Named Primary Money Laundering Concern*, WALL ST. J. (July 17, 2014, 6:31 PM), http://blogs.wsj.com/riskandcompliance/2014/07/17/fbme-bank-ltd-named-as-primary-money-laundering-concern. By contrast, there are thousands of SDN listings, which the government frequently revises, making such changes more routine. Second, unlike SDN lists, section 311 has a proposed rulemaking period in which it announces that an entity is at risk of being penalized, but does not actually impose the penalty unless it adopts a final rule. By contrast, once an SDN designation is made, the entity's assets in the United States are frozen and transactions involving it are blocked. That is, the central purpose of an SDN designation is to cut the listed entity out of the U.S. market rather than, as in high-profile blacklists, influence foreign entities to cut their ties with the listed entity. Nonetheless, foreign entities sometimes follow the U.S. SDN List even when they are not legally obliged.

165. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 311, 116 Stat. 272, 298–304 (codified as amended at 31 U.S.C. § 5318A (2012)).

166. Specifically, financial institutions under U.S. jurisdiction may be required to maintain records on: (1) transactions occurring in a jurisdiction outside of the United States, (2) the beneficial ownership of any account opened or maintained in the United States, (3) the identity and other information of any customer who opens or maintains a payable-through account, or (4) the identity and other information of any customer who opens or maintains a correspondent account involving any jurisdiction of primary money-laundering concern. Treasury may also prohibit banks from opening or maintaining a payable-through or correspondent account involving any jurisdiction of primary money-laundering concern, or impose restrictive conditions on such accounts. 31 U.S.C. § 5318A(b) (2012).

167. For instance, foreign (and domestic) banks may reduce ties preemptively, expecting the government to impose follow-up measures later on.

168. *See infra* note 188 and accompanying text. For a recent survey suggesting the importance of reputation in the financial sector, see Scott Tangney, *The 2014 Makovsky Wall Street Reputation Study*, MAKOVSKY INTEGRATED COMM. (June 17, 2014), http://www.makovsky.com/insights/blogs/word-on-the-street/28-insights/blogs/word-on-the-street/641-wall-street-reputation-study-2014.

169. ZARATE, TREASURY'S WAR, *supra* note 118, at 152.

The government's formative experience with high-profile blacklisting was with a Macau-based bank named Banco Delta Asia (BDA), one of the most important foreign banks dealing with North Korea.[170] Although hostile relations between the United States and North Korea date back more than half a century, North Korea's withdrawal from the Nuclear Non-Proliferation Treaty in 2003 dramatically increased its perceived threat to Asia-Pacific security arrangements and the United States. In 2005, as part of a policy to intensify pressure on North Korea, Treasury blacklisted BDA as a first step under section 311 on the grounds that the bank had laundered money used to facilitate the proliferation and counterfeiting of WMD.[171]

Even without taking the second step of wielding a financial stick in the form of a "special measure" or issuance of a final rule, Treasury's naming of BDA had immediate, dramatic effects in the months following its section 311 blacklisting.[172] First, concerned that other banks would also be designated, Macau authorities took over BDA and froze $25 million of North Korean assets.[173] Soon after, the bank's customers moved $130 million out of their accounts.[174] In less than a week, the bank had lost one third of its deposits.[175]

More striking, the mere naming of BDA had a powerful impact on both U.S. and foreign banks. In what one journalist has likened to a "ripple" effect,[176] banks across Europe and Asia with and without ties to the United States began to severely limit or entirely cut off their banking ties with BDA and North Korea.[177] In January

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170. For a rare insider account of the BDA action, *see* DAVID L. ASHER, VICTOR D. COMRAS & PATRICK M. CRONIN, CTR. FOR A NEW AM. SEC., PRESSURE: COERCIVE ECONOMIC STATECRAFT AND U.S. NATIONAL SECURITY 42–48 (2011). As the authors state, the government intended to use the BDA designation for three purposes: as a signal to China about the financial transactions of Chinese banks with North Korea, as a threat should negotiations with North Korea break down, and as an important instrument for unveiling evidence linking top North Korean officials to widespread criminal activity and exposing banks in Macau as complicit in money laundering. *Id*. at 43. It is worth noting that Asher et al. do *not* mention what scholars and the public often assume to be the main driver of U.S. sanctions: delaying or impeding North Korea's nuclear program.

171. Finding That Banco Delta Asia SARL Is a Financial Institution of Primary Money Laundering Concern, 70 Fed. Reg. 55,214 (Sept. 20, 2005). This was not the first time Treasury had designated an institution under section 311. In 2003, Treasury designated two banks in Burma as primary money-laundering concerns. *See* J.C. SHARMAN, THE MONEY LAUNDRY: REGULATING CRIMINAL FINANCE IN THE GLOBAL ECONOMY 121 (2011). It is not entirely clear why this designation did not have the same impact, but possible explanations include that many countries already had sanctions against Burma and that Burmese banks were, compared to BDA, not as connected to foreign banks.

172. The Treasury Department imposed special measures only two years later, in March 2007. Special Measures Against Banco Delta Asia, 31 C.F.R. § 103.193 (2010).

173. Steven R. Weisman, *The Ripples of Punishing One Bank*, N.Y. TIMES, July 3, 2007, at C1 [hereinafter Weisman, *Ripples*]; *see also* ASHER ET AL., *supra* note 170, at 43–44; SHARMAN, *supra* note 171, at 123.

174. Javier Serrat, *Money Talks: The Surging Revolution in Counter-Proliferation Strategy*, RUSI J., Dec. 2011, at 40, 42.

175. SHARMAN, *supra* note 171, at 122.

176. *See* Weisman, *Ripples*, *supra* note 173.

177. SHARMAN, *supra* note 171, at 123 ("U.S. banks did not wait for the results of the FinCEN investigation but immediately cut their ties with the bank, as did major Korean and

2006, USB and Credit Suisse were among the first major banks to cut back on their transactions.[178] By the summer of 2007, German, French, and British banks had followed suit, with Dubai banks close behind. Notably, these banks were not acting out of a formal legal obligation because Treasury had not issued a final rule imposing any special measures.

In hindsight, banks' decisions to cut ties with BDA and North Korea were probably motivated by both market access and reputational concerns, which are intertwined. Both U.S. banks and foreign banks with U.S. branches may have acted preemptively, expecting special measures to be imminent. Banks without U.S. ties may have cut off connections based on concerns that they, too, would be blacklisted for holding North Korean or BDA accounts.[179]

In addition to these considerations of direct market access, both U.S. and foreign banks may have been influenced by more indirect, harmful reputational costs of being associated with a bank listed as a primary money-laundering concern.[180] This potential influence of reputational concerns is evident in the United States' attempt to return BDA's frozen assets two years later during negotiations with North Korea. North Korea had mandated recovery of its funds as a precondition for proceeding with the negotiations.[181] The U.S. government approached a number of U.S. and foreign banks to transfer the money back to North Korea, but the banks refused.[182] In the end, after promising that it would not enforce its own regulations in this instance,[183] the United States was able to convince the Russian Central Bank and the Far Eastern Bank in Vladivostok to facilitate the transaction.[184] Two years later, Treasury did impose follow-up measures requiring banks under U.S. jurisdiction to cut their ties with BDA.[185] By this time, however, the issue was moot; banks had already closed their accounts.

The important point here is not that reputational concerns influenced foreign bank decision making; that is ultimately an empirical question that warrants more analysis. Rather, the central claim is that U.S. government officials, both within and outside Treasury, shaped their policy to leverage reputational dynamics in the financial sector to extend their influence over foreign banks—even those with weak U.S. ties. As then-Treasury Secretary Paulson stated in 2007, "[O]nce some in the private sector decide to cut off those we have targeted, it becomes an even greater

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Japanese institutions. The reverberation effect of blacklisting . . . came into play."); *see also* Zarate, *Harnessing the Financial Furies*, *supra* note 137, at 48.

178. Loeffler, *supra* note 129, at 106.

179. SHARMAN, *supra* note 171, at 123 n.76 and accompanying text (citing Treasury official Danny Glaser stating that the designation of BDA was "a shot heard round the world for national bankers who cut off relations with North Korea, fearing that something like what happened [to BDA] could happen to them").

180. *See id.* at 102.

181. This demand triggered "vigorous debate" within the government, with some supporting the return of funds, and others opposing it on legal grounds. FEAVER & LORBER, *supra* note 14, at 27. *See generally* ASHER ET AL., *supra* note 170, at 42–48.

182. FEAVER & LORBER, *supra* note 14, at 27 (citing Weisman, *Ripples*, *supra* note 173).

183. *Id.*

184. *Id*.

185. Press Release, U.S. Dep't Treasury, Treasury Finalizes Rule Against Banco Delta Asia BDA Cut Off From U.S. Financial System, HP-315 (Mar. 14, 2007), *available at* http://www.treasury.gov/press-center/press-releases/Pages/hp315.aspx.

reputational risk for others not to follow, and so they often do."[186] Political scientists Peter Feaver and Eric Lorber explain the logic further:

> The rest of the system responds this way not necessarily because they agree with the designation—and perhaps not at all because they sympathize with the larger political aims—but simply because they agree that if others think this particular entity might be tainted they do not want the taint on them.[187]

This worry about being tainted may apply not only to the initially blacklisted individual or entity, but also to its business partners.

The reputational logic that the U.S. government sought to trigger with its high-profile blacklisting thus concerns intra-industry reputation more than reputation with the general public or individual clients.[188] Banks worry that they may lose standing in the eyes of other banks, thus damaging their creditworthiness.[189] Ample scholarship on the importance of reputation in the banking industry suggests that the government's calculation about the role of reputation is at least plausible rather than mere posturing.[190] As legal scholar Antoinette Verhage states, "Surprisingly, banks most fear the effect on their reputation with regard to other banks. Not many respondents worried about the effect of money laundering scandals on their clients."[191] If one bank facilitates transactions with a U.S.-designated bank, other banks are likely to move their

186. Henry M. Paulson, Sec'y, U.S. Dep't of the Treasury, Remarks at the C. Peter McColough Series on International Economics at the Council on Foreign Relations (June 14, 2007) [hereinafter Remarks by Sec'y Paulson] (transcript available at http://www.cfr.org/world/c-peter-mccolough-series-international-economics-henry-m-paulson-rush-transcript-federal-news-service/p13620).

187. FEAVER & LORBER, *supra* note 14, at 34.

188. Reputation among clients, however, also plays a role, and financial institutions tend to be particularly sensitive here too. Banks offer a homogeneous product. As Feaver and Lorber argue, "[A]ll financial institutions are selling the same thing—a dollar is a dollar, whoever gives it to you . . . ." *Id.* at 33. Banks thus must compete on the rates and range of the services they offer as well as on their reputations. "The 'brand' of a bank is not so much the quality of the money but the quality of the overall reputation for confidential and prudent business practices." *Id.* Reputational damage is often viewed as a negative indicator of a bank's financial soundness and future stability. Jackie Harvey & Siu Fung Lau, *Crime-Money, Reputation and Reporting*, 52 CRIME L. & SOC. CHANGE 57, 59 (2009).

189. ANTOINETTE VERHAGE, THE ANTI MONEY LAUNDERING COMPLEX AND THE COMPLIANCE INDUSTRY 39 (2011) (stating that reputational damage can lead "to the loss of trustworthiness with regard to other banks").

190. *See, e.g.*, *id.*; Harvey & Lau, *supra* note 188. For a recent argument challenging the importance of reputation in the banking industry, see JONATHAN R. MACEY, THE DEATH OF CORPORATE REPUTATION: HOW INTEGRITY HAS BEEN DESTROYED ON WALL STREET (2013).

191. VERHAGE, *supra* note 189, at 81. Verhage further writes: "Reputation is stated to be one of the most important factors in the financial sector and can therefore be used as a mechanism to put pressure on the sector." *Id.* at 38; *see also id.* at 81 (naming reputation as the most cited motive by bankers in explaining their investments in their compliance programs); Michael Jacobson, *Sanctions Against Iran: A Promising Struggle*, WASH. Q., Summer 2008, at 69, 74 (2008) ("Maintaining stellar reputations is one of a bank's top priorities.").

business elsewhere.[192] Bank officials themselves have frequently stated that they comply with U.S. policy to protect their reputations.[193]

The BDA blacklisting experience demonstrated to U.S. officials that they did not have to do much to influence the decisions of banks across the globe.[194] As Zarate explained, "[W]hat appeared to be a simple unilateral regulation against a private bank unleashed the market-based financial furies against North Korea."[195] As U.S. government officials view it, once they raise the red flag through blacklisting an entity, foreign and domestic banks cut ties for prudential reasons concerning market access and reputation. As former Secretary of State Condoleezza Rice observed, Treasury's novel strategy has relied on the banks' self-interest "to protect their reputation and protect their investment."[196]

Treasury's experience with BDA provided insights that the government began to apply in 2006 in its new campaign against Iran. One journalist described Treasury's new logic: "Banks were only as reputable as their clients' practices. And the reputations of banks that did business with Iran were at risk as long as Iran financed extremists and pursued missile and nuclear technology."[197] Then-Under Secretary Levey understood that these reputational concerns could reverberate beyond the limits of Treasury's regulatory reach.[198] Whether for market access or reputational incentives, the sheer act of naming a foreign bank, without any follow-up action implicating foreign bank partners, seemed to have gained traction.

The government's reliance on high-profile blacklists as a tactic is relatively rare, but still important.[199] In 2011, for instance, the government blacklisted two Syrian banks under section 311 and took the special measure of requiring banks under

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192. *See* FEAVER & LORBER, *supra* note 14, at 33.

193. *See id.* at 38, 42.

194. Weisman, *Ripples*, *supra* note 173.

195. Zarate, *Harnessing the Financial Furies*, *supra* note 137, at 51. Rachel L. Loeffler writes that "the mere announcement of a possible regulatory measure that would apply only to U.S. institutions caused banks around the world to refrain from dealing with BDA and North Korea." Loeffler, *supra* note 129, at 104.

196. Wright, *Stuart Levey's War*, *supra* note 109.

197. *Id.*

198. Thornton, *supra* note 154.

> U.S. authorities may not have expected to compel the non-U.S. banks to drop such business altogether, but they appealed to the reputational concerns of these entities, and authorities intended to close off access to the U.S. financial system for such business. Many non-U.S. financial institutions responded favorably, and some announced that they were voluntarily terminating their Iran-related business.

Id.

199. Between 2011 and 2014, Treasury named only seven institutions as primary money laundering concerns under section 311 of the USA PATRIOT Act, 31 U.S.C. § 5318A (2012). *Section 311—Special Measures: Special Measures for Jurisdictions, Financial Institutions, or International Transactions of Primary Money Laundering Concern*, U.S. DEPARTMENT TREASURY FINCEN, http://www.fincen.gov/statutes_regs/patriot/section311.html. Most recently, Treasury designated FBME bank as a primary money-laundering concern. Rachel Louise Ensign, *FBME Bank Named Primary Money Laundering Concern*, WALL ST. J. (July 17, 2014, 6:31 PM), http://blogs.wsj.com/riskandcompliance/2014/07/17/fbme-bank-ltd-named-as-primary-money-laundering-concern.

U.S. jurisdiction to cut off their ties with both banks.[200] One unnamed government official noted that the blacklisting could potentially move Russian banks to limit ties with their Syrian partners. As the official explained, Russian banks might fear that doing business with Syrian banks would put their U.S. accounts at risk.[201] To be sure, Russia's more recent invasion of Ukraine and Treasury's subsequent financial restrictions on Russian banks and other entities complicates this picture.[202] But the logic underlying Treasury's tactic of semiformal measures still prevails. As Rachel L. Loeffler notes, "Banks outside the United States often adhere to U.S. watch lists even when they are not required by domestic or international law to do so."[203]

C. Direct Diplomacy

The final and most informal tactic that Treasury uses to enlist the help of foreign banks is "direct diplomacy." In addition to meeting with foreign government officials, Treasury officials meet directly with foreign bank executives to elicit their cooperation with U.S. policy, both to track and stop illicit financial flows. Although the government uses direct diplomacy regularly with foreign government officials and domestic firms,[204] as far as the public record shows, this form of systematic diplomatic outreach to foreign bank executives emerged only after 9/11. In source, direct diplomacy is less formal than blacklisting and financial sticks, since the legal sources Treasury might point to for its authority do not specifically authorize or discuss diplomacy.[205] Like high-profile blacklists, direct diplomacy is similarly informal in content; it does not impose legal obligations on those involved in the meetings. Nonetheless, it too may trigger foreign banks' concerns about market access and reputation, moving them to shut down ties even in the absence of a binding legal obligation.

One example of direct diplomacy comes from the government's efforts to collect financial intelligence from the Society for Worldwide Interbank Financial Telecommunication (SWIFT), a private Belgium-incorporated telecommunications consortium of foreign banks.[206] Established in 1973 by European banks,[207] SWIFT

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200. Press Release, U.S. Dep't Treasury, Treasury Sanctions State-Owned Syrian Financial Institutions and Syria's Largest Mobile Phone Operator (Aug. 10, 2011), *available at* http://www.treasury.gov/press-center/press-releases/Pages/tg1273.aspx (designating the Commercial Bank of Syria and the Syrian Lebanese Commercial Bank).

201. Arshad Mohammed, *Russian Banks Should Beware Blacklisted Syria Banks: U.S. Official*, REUTERS, Jan. 7, 2013, http://www.reuters.com/article/2013/01/07/us-syria-usa-banks-idUSBRE9060S420130107.

202. Press Release, U.S. Dep't Treasury, Announcement of Additional Treasury Sanctions on Russian Financial Institutions and on a Defense Technology Entity (July 29, 2014), *available at* http://www.treasury.gov/press-center/press-releases/pages/jl2590.aspx. Cut off from the U.S. market, these banks now have nothing to lose in continuing, and indeed strengthening, their ties with those Syrian banks identified as primary money laundering concerns.

203. Loeffler, *supra* note 129, at 102.

204. *See* KENNETH A. RODMAN, SANCTIONS BEYOND BORDERS (2001).

205. *Infra* note 250 and accompanying text.

206. Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. After 9/11 to Block Terror Networks*, N.Y. TIMES, June 23, 2006, at A1; *see also* Henderson, *supra* note

serves essentially as an "electronic postal service for the financial industry."[208] It does not accept deposits but instead transfers messages between international parties to a financial transaction.[209] In the words of one journalist, SWIFT is the "mother lode, the Rosetta stone for financial data."[210] Along with a U.S.-based private consortium, Clearing House Interbank Payments System (CHIPS),[211] SWIFT has acquired a near monopoly on bank messaging.[212] Almost every international bank transaction is sent through SWIFT networks and SWIFT servers. Tapping into the SWIFT database is, as one legal scholar put it, "a childhood dream for many intelligence officers."[213]

Between 2002 and 2006, Treasury convinced SWIFT officials to covertly hand over troves of financial data. When SWIFT officials hesitated, Treasury, and the executive branch more broadly, turned to direct diplomacy to ensure SWIFT's continued collaboration. Compared to financial sticks and high-profile blacklists, Treasury's tactic was legally informal: there seemed to be no explicit congressional approval or executive order mandating its direct diplomacy campaign, nor did the campaign itself impose legal obligations on SWIFT officials.[214] Yet, for a time,

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32, at 981; Glenn R. Simpson, *Treasury Tracks Financial Data in Secret Program*, WALL ST. J., June 23, 2006, at A1.

207. *SWIFT History*, SWIFT, http://www.swift.com/about_swift/company_information/swift_history.

208. JOHANNES KÖPPEL, THE SWIFT AFFAIR: SWISS BANKING SECRECY AND THE FIGHT AGAINST TERRORIST FINANCING § 1.1 (2011), *available at* http://books.openedition.org/iheid/321.

209. *Id.*

210. ERIC LICHTBLAU, BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE 243 (2008) [hereinafter LICHTBLAU, BUSH'S LAW].

211. CHIPS is the world's largest private-sector U.S.-dollar funds-transfer system. *About CHIPS*, CLEARING HOUSE, http://www.chips.org/about/pages/033738.php. SWIFT sends the execution instructions for most of the financial transfers effected by CHIPS. Alexander Bligh, *Developing Intelligence in the Field of Financing Terror—An Analytical Model of Anti-Terror Inter Agency and Cross Border Cooperation: The Security of Financial Systems Dimension*, 2011 EUR. CONF. ON INFO. WARFARE & SEC. 31, 33 (article on file with Indiana Law Journal).

212. In 2012, SWIFT transferred approximately 18 million messages per day, for a total of approximately 4.6 billion messages that year. SWIFT has more than 10,500 subscribers in 215 countries. *Company Information*, SWIFT, http://www.swift.com/about_swift/company_information/company_information.

213. KÖPPEL, *supra* note 208, § 1.2. As a financial messenger, SWIFT, under direction of the European Union, also has the power to block the flow of money by excluding banks from its consortium. This is precisely what it did in the case of Iran in 2012, seemingly under U.S. pressure. Christopher Harress, *The Treasury's War on Russia: Sanctions May Bite but the Strongest Tool Is Unlikely to Be Used*, INT'L BUS. TIMES (Mar. 26, 2014, 2:00 PM), http://www.ibtimes.com/treasurys-war-russia-sanctions-may-bite-strongest-tool-unlikely-be-used-1563608.

214. Byron Calame, *Secrecy, Security, the President and the Press*, N.Y. TIMES, July 2, 2006, http://www.nytimes.com/2006/07/02/opinion/02pub-ed.html ("Secrecy is vital for intelligence and national security programs, but so is oversight by the courts or elected legislators. The Swift program, however, doesn't seem to have any specific Congressional approval or formal authorization. The Treasury Department has not provided a list of who in Congress was informed, or when, The Times has reported."). As discussed below, SWIFT was legally obliged to transfer data based on Treasury's use of monthly subpoenas, not based on Treasury's diplomatic outreach. *See infra* note 217.

direct diplomacy worked: the SWIFT surveillance operation was the government's primary source of financial intelligence during this period, one that the government claims helped to identify a number of terrorists.[215] Following the *New York Times*' exposure of the surveillance program in 2006, however, SWIFT's collaboration with the government became significantly more limited, restricting U.S. access to intra-European transactions.[216]

The government-SWIFT partnership is useful in shedding light on how foreign banks may cooperate with the U.S. government for reasons beyond legal obligation. At first glance, SWIFT's cooperation looks like a simple case of legal compulsion based on territorial jurisdiction; SWIFT had and still has an operation center in the United States, giving the government, specifically Treasury, the ability to subpoena and gain full access to SWIFT's vast repository of financial data.[217] Yet, a closer analysis reveals that this territorial-jurisdiction explanation is only partial. It shows that the mere assertion of legal authority by the United States does not necessarily make law the main force motivating foreign firms' cooperation with U.S. policies.

At least twice before 9/11, the U.S. government issued subpoenas demanding access to SWIFT's data.[218] For example, it did so in the early 1990s, in the middle of the "war on drugs," when under President George H.W. Bush, the Department of Justice appears to have requested access to SWIFT's database.[219] Following the 1998 embassy bombings in Dar es Salaam and Nairobi, the CIA and the Department of Treasury in the Clinton Administration requested access.[220] Both of these times, SWIFT officials refused.[221] Under significant pressure from the first

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215. Patrick M. Connorton, *Tracking Terrorist Financing Through SWIFT: When U.S. Subpoenas and Foreign Privacy Law Collide*, 76 FORDHAM L. REV. 283, 290–91 (2007).

216. James Risen, *U.S. Reaches Tentative Deal with Europe on Bank Data*, N.Y. TIMES, June 29, 2007, at A6.

217. Under the authority of the 1977 International Emergency Economic Powers Act, former President Bush signed Executive Order 13,224 granting Treasury (including OFAC) the authority to use administrative subpoenas to access financial information. Treasury worked with the FBI to search the SWIFT database. The FBI presumably had access to this data through its use of administrative subpoenas called "national security letters." Siobhan Gorman, *NSA's Domestic Spying Grows as Agency Sweeps up Data: Terror Fight Blurs Line over Domain; Tracking Email*, WALL ST. J., Mar. 10, 2008, at A1. For a discussion of the increased use of National Security Letters under the Patriot Act, see Andrew E. Nieland, Note, *National Security Letters and the Amended Patriot Act*, 92 CORNELL L. REV. 1201 (2007).

218. KÖPPEL, *supra* note 208, § 1.2; Justin Santolli, *The Terrorist Finance Tracking Program: Illuminating the Shortcomings of the European Union's Antiquated Data Privacy Directive*, 40 GEO. WASH. INT'L L. REV. 553, 561 (2008).

219. LICHTBLAU, BUSH'S LAW, *supra* note 210, at 242.

220. KÖPPEL, *supra* note 208, § 1.2 (citing John Mintz, *Bin Laden's Finances Are Moving Target*, WASH. POST, Aug. 28, 1998, at A1).

221. According to the opinion by the Belgian Privacy Commission, SWIFT officials denied the request on numerous logistical grounds such as the subpoena's time frame and the consortium's technological inability to perform specific searches. ROYAUME DE BELGIQUE COMMISSION DE LA PROTECTION DE LA VIE PRIVEE, OPINION NO. 37/2006, OPINION ON THE TRANSFER OF PERSONAL DATA BY THE CSLR SWIFT BY VIRTUE OF UST (OFAC) SUBPOENAS, (2006) (Belg.), *available at* http://www.steptoe.com/assets/attachments/2644.pdf [hereinafter ROYAUME DE BELGIQUE COMMISSION]. Legal, cultural, and strategic

Bush Administration, SWIFT threatened to move its center out of the United States if the government continued to pressure it.[222] The government backed down.[223] The U.S. government's legal authority did not change between the first two refuted subpoena attempts and the post-9/11 subpoena. The obvious question arises: Why, after 9/11, did SWIFT then suddenly agree to cooperate when it had resisted earlier? A purely legal explanation pointing to territoriality leaves that question unanswered.

SWIFT's initial post-9/11 cooperation—transferring data to Treasury and CIA on a monthly basis—appears not to have been a function of direct diplomacy or any other government strategy.[224] Rather, in the wake of the 9/11 attacks, SWIFT's cooperation seems better explained by a wave of both individual and transnational support for and identification with the United States.[225] In the words of one senior SWIFT official, before 9/11, "providing access to its sensitive data would have been anathema to the Belgium-based consortium," but the 9/11 attacks "led to a new mindset in many industries, including telecommunications."[226] As the shock of 9/11

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reasons also influenced SWIFT's refusal. As Eric Lichtblau writes, "with Europe's tough banking secrecy laws and cultural mindset, SWIFT didn't want to be seen as a clandestine partner of the U.S. government in giving away access to sensitive banking data and putting itself in legal jeopardy in the process." LICHTBLAU, BUSH'S LAW, *supra* note 210, at 242.

222. LICHTBLAU, BUSH'S LAW, *supra* note 210, at 242 (stating that "[t]he Bush Administration 'pushed them very hard'" and, "So deep were their reservations that the company's executives warned U.S. officials that if they tried to subpoena its banking information, SWIFT would pull its U.S. outlets off American soil so it couldn't be forced to comply with the demand."). This was not an empty threat: SWIFT moved its intra-European data to Switzerland after the *New York Times* exposed the 2002–06 covert surveillance operation in 2006.

223. *See* ROYAUME DE BELGIQUE COMMISSION, *supra* note 221.

224. *See* Santolli, *supra* note 218, at 561. Some accounts, moreover, suggest that SWIFT officials requested the subpoenas in the first place, calculating that if its collaboration were to ever come to light, the consortium could point to the subpoenas as justification. As Lichtblau writes, the subpoena was an "afterthought" with "many details of the novel arrangement left to be worked out." "The company's lawyers wanted protection—a subpoena, a piece of paper, something to make clear if and when the program was exposed that the company was *obligated* to cooperate." LICHTBLAU, BUSH'S LAW, *supra* note 210, at 243–44 (emphasis in original). SWIFT offers a different account and suggests that it cooperated because it was legally obliged. *SWIFT Statement on Compliance to European Parliament*, SWIFT (Oct. 4, 2006), http://www.swift.com/about_swift/legal/eu_parliament_hearing_swift_statement.

225. Josh Meyer & Greg Miller, *U.S. Secretly Tracks Global Bank Data*, L.A. TIMES, June 23, 2006, at A1. At the time of 9/11, SWIFT was headed by an American, Leonard Schrank, then-President of the Chamber of Commerce in Belgium. When Treasury officials made the initial call to Schank about accessing SWIFT data, he apparently responded: "What took you so long?" LICHTBLAU, BUSH'S LAW, *supra* note 210, at 243; *see also* Leonard H. Schrank & Juan C. Zarate, *Data Mining, Without Big Brother*, N.Y. TIMES, July 3, 2013, at A25; Glenn R. Simpson, *American Executive in Brussels Aided Terrorist-Tracking Program*, WALL ST. J., June 24, 2006, at A4. Private firms have also cooperated with the government out of a wave of patriotic loyalty to the U.S. government, which in this case may have translated into transnational loyalty as well. Michaels, *Deputizing Homeland Security*, *supra* note 24, at 1447 (citing RON SUSKIND, THE ONE PERCENT DOCTRINE 209–11 (2006)).

226. Meyer & Miller, *supra* note 225, at A1. Indeed some evidence suggests that SWIFT officials were, at least initially, eager to cooperate. Realizing, for instance, that they could

began to abate and the contentious politics of the Iraq War took center stage, SWIFT's willingness to give the government essentially carte blanche to access its enormous data repository began to wane.[227] By the spring of 2003, despite monthly Treasury subpoenas, SWIFT had begun to withhold its data. U.S. government officials, as *New York Times* journalist Eric Lichtblau put it, "were panicked."[228]

To persuade SWIFT to continue its collaboration, the government did not impose additional legal obligations or insist on existing ones, but turned instead to direct diplomacy—specifically, "red-carpet" treatment of SWIFT officials. Treasury officials, in the words of Lichtblau, "scrambled to set up a day-long series of emergency meetings in Washington to plead their case directly to SWIFT's executives."[229] This direct diplomacy evolved into a "full-court press."[230] CIA officials gave SWIFT officials a classified briefing in the Situation Room. National Security Adviser Condoleezza Rice made "a surprise appearance."[231] High-level Treasury officials and Federal Reserve Chairman Alan Greenspan held a meeting with SWIFT officials. And lastly, FBI Director Robert Mueller shared intelligence showing the specific instances in which SWIFT data had helped to identify terrorist threats.[232]

The red-carpet diplomacy strategy worked, although it is difficult to understand precisely why it was effective.[233] One possibility is that the classified information that the CIA made available was so persuasive that SWIFT officials revised their calculations about the merits and justifiability of the program. It is also possible that meetings with top U.S. officials created social and professional pressures that were hard to resist. SWIFT officials probably had never envisaged that they would be invited to the White House, much less have direct talks with leading figures of the Administration. Nor could they have dreamed of being ushered into the Situation Room for a briefing by the brass of the CIA. A final possibility is that SWIFT felt reassured by the proposal for new, somewhat more stringent procedures regulating surveillance operations.[234] The new procedures allowed a

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not selectively extract the data requested by Treasury, SWIFT officials offered, "We'll give you all the data." LICHTBLAU, BUSH'S LAW, *supra* note 210, at 244. This stands in stark contrast to SWIFT officials' pointing to the inability to extract data as grounds for refusing the government's subpoenas prior to 9/11. Meyer & Miller, *supra* note 225. From Treasury's perspective, the grant of blanket access to the data was "an act of true patriotism." LICHTBLAU, BUSH'S LAW, *supra* note 210, at 233.

227. LICHTBLAU, BUSH'S LAW, *supra* note 210, at 233. This accounting relies heavily on Lichtblau's investigative reporting, particularly in Chapter 8.

228. *Id.* at 234.

229. *Id.*

230. *Id.* at 232.

231. *Id.*

232. *Id.* at 247.

233. Meyer & Miller, *supra* note 225.

234. In 2004, SWIFT and the United States signed an agreement "which assured SWIFT that the original source of the data (i.e. SWIFT) would be kept confidential by the U.S. Treasury Department." KÖPPEL, *supra* note 208, § 1.5. Additionally, the United States offered to narrow the definition of terrorism for the purposes of search requests and agreed to allow two SWIFT officials "to be physically present when the CIA searched the data provided by SWIFT." *Id.*

SWIFT official to be present during data searches and granted SWIFT the authority to stop searches that appeared to exceed the scope of the investigation.[235]

The SWIFT-Treasury financial surveillance operation continued undetected for another three years, until the *New York Times* disclosed it on June 23, 2006.[236] The fallout of the disclosure exposed the limits of direct diplomacy. The revelation of the operation incited criticism by some in the United States, including civil rights groups and both conservative and liberal members of Congress.[237] Other political groups and Bush Administration officials issued statements, some of them scathing, condemning the *New York Times* for exposing the covert collaboration.[238] In Europe, news of the SWIFT-U.S. operation triggered outrage.[239] Bank regulators, human rights groups, and many members of the European Parliament were incensed; they viewed the surveillance program as a blanket violation of European privacy laws.[240] In September 2006, for instance, the Belgian Privacy Commission released a report rebuking SWIFT for its data transfers.[241]

In response to this barrage of criticism, SWIFT announced in June 2007 that it would begin to restructure its data-storage programs to allow for intra-European financial data to be stored only in Europe.[242] Once the restructuring was completed

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235. It is unclear whether the revised SWIFT-Treasury agreement posed a meaningful constraint on data searches. Lichtblau reports that SWIFT officials intervened quite frequently in the months that followed, LICHTBLAU, BUSH'S LAW, *supra* note 210, at 248, but Köppel suggests the authority was mostly symbolic, *see* KÖPPEL, *supra* note 208, §1.5.

236. Lichtblau & Risen, *supra* note 206.

237. Peter Baker, *Surveillance Disclosure Denounced*, WASH. POST, June 27, 2006, at A1; Press Release, ACLU, ACLU Says Government Spying on Bank Records is Further Abuse of Power, (June 23, 2006), *available at* https://www.aclu.org/national-security/aclu-says-government-spying-bank-records-further-abuse-power.

238. Baker, *supra* note 237. Some legal scholars also disparaged the *New York Times*' decision to reveal the program. *See* Jack Goldsmith, *Secrecy and Safety*, NEW REPUBLIC, Aug. 13, 2008, at 31; *see also* Anthony Amicelle, *The Great (Data) Bank Robbery: Terrorist Finance Tracking Program and the "SWIFT Affair*,*"* RESEARCH QUESTIONS, May 2011, at 1, 7–8, *available at* http://ssrn.com/abstract=2282627. Six weeks after the publication, *New York Times* editor Byron Calame issued a public apology for publishing the piece. Byron Calame, *Can 'Magazines' of the* Times *Subsidize News Coverage?*, N.Y. TIMES, Oct. 22, 2006, at C12.

239. For instance, immediately prior to President George Bush's visit, European Commission President José Manuel Barroso warned, "'[W]e risk losing our souls' if the privacy rights of individuals were ignored in the pursuit of terrorists." Dan Bilefsky, *Bank Consortium Faces Outcry on Data Transfer*, N.Y. TIMES, June 28, 2006, http://www.nytimes.com/2006/06/28/world/europe/28iht-suit.2071000.html.

240. *See id.*; Dan Bilefsky, *Europeans Berate Bank Group and Overseer for U.S. Access to Data*, N.Y. TIMES, Oct. 5, 2006, at A15. A leading privacy rights NGO based in London, Privacy International, filed complaints with data protection authorities in thirty-two countries. Dan Bilefsky, *Group Tries to Block Program Giving Data to U.S.*, N.Y. TIMES, June 27, 2006, http://www.nytimes.com/2006/06/27/world/27cnd-secure.html.

241. ROYAUME DE BELGIQUE COMMISSION, *supra* note 221. The Commission retracted the report two years later on grounds that surveillance operations were consistent with U.N. security resolutions and that SWIFT had taken substantial measures after the program's disclosure to enhance its data protections. KÖPPEL, *supra* note 208, § 1.4.

242. This entailed installing a new operation center in Switzerland and then allowing countries to decide whether they wanted their transactions to go through the European

in January 2010,[243] the United States would no longer have access to financial transactions conducted within Europe.[244] True to the words of SWIFT officials, the new operation center opened in January 2010.[245]

SWIFT's decision to shift the intra-European data out of the United States' reach is important: it shows that red-carpet diplomacy is effective only under some conditions. In this case, SWIFT's reputational concerns about client privacy won out over the Americans' red-carpet persuasion campaign.

SWIFT's change in policy is also important because it provides strong evidence that SWIFT's cooperation between 2002 and 2006 was not simply a function of legal compulsion based on U.S. subpoenas. Before and after 2006, SWIFT officials had the same option of insulating some or all of its data by moving it abroad. What motivated SWIFT to insulate its data after 2006 was not a shift in the government's legal authority, but in SWIFT's incentives. Before the *New York Times* exposé, SWIFT's reputation was not on the line, and there was no public pressure to reject U.S. subpoenas. Direct diplomacy and post-9/11 allegiance, however fleeting, gave SWIFT officials sufficient reason to cooperate. Put differently, SWIFT was legally obligated to respond to U.S. subpoenas. But legal obligation does not fully explain why it did so.

The United States has also used direct diplomacy with foreign bank executives in its efforts to stem the flow of money to Iran.[246] Treasury officials recognized that it would be useful to do more than rely on financial sticks and high-profile blacklists to steer foreign banks away from their Iranian connections. In 2005,[247] they began to launch an unprecedented series of diplomatic initiatives, holding meetings directly with foreign bank officials and urging them to cut off connections with Iran. Treasury met not only with banks that had strong U.S. ties—those with branches or subsidiaries located in the United States—but also with banks that did

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centers or the American one. Almost all countries selected the European centers. KÖPPEL, *supra* note 208, § 1.5.

243. *SWIFT Statement on the European Parliament's Rejection of the Interim EU-US Agreement on the Terrorist Finance Tracking Programme*, SWIFT (Feb. 11, 2010), http://www.swift.com/about_swift/legal/swift_statement_eu_parliament_rejection [hereinafter *Swift Statement*].

244. *Terrorist Finance Tracking Program*, SWIFT, http://www.swift.com/about_swift /legal/terrorist_finance_tracking_program ("SEPA data are not in the scope of the EU-US agreement. Since the implementation of SWIFT's distributed architecture in the beginning of 2010, intra-European messages are only channelled (and archived, where applicable) in SWIFT's European operational centers and no longer in the US.").

245. *SWIFT Statement*, *supra* note 243.

246. Although this discussion focuses on Iran, Treasury employed this direct diplomacy for North Korea too, and presumably discussed both countries during the various meetings. *See* Steven R. Weisman, *U.S. Pursues Tactic of Financial Isolation*, N.Y. TIMES, Oct. 16, 2006, at A10 [hereinafter Weisman, *Financial Isolation*] ("In the last year, Mr. Levey has traveled to several countries in Europe to exert pressure on Iran and to Singapore, China, Macao, Hong Kong, Vietnam and South Korea to press banks to break their ties with North Korea.").

247. Although journalists and congressional reports state that Treasury launched this initiative in 2006, cables available on WikiLeaks suggest these meetings began in 2005, if not earlier. *Ambassador's Meeting with Central Bank Governor and Ahli United Bank*, WIKILEAKS (Aug. 2, 2007, 1:32 PM), https://www.wikileaks.org/plusd/cables/07MANAMA747_a.html [hereinafter WIKILEAKS, *Ambassador's Meeting*].

not.[248] While Treasury officials did not abandon traditional, government-to-government diplomacy, they concentrated their efforts on direct outreach to foreign executives.[249] As with its direct diplomacy with SWIFT, the diplomacy campaign in the Iran case was legally informal. Executive orders appear to have generally authorized but did not specifically enumerate Treasury's diplomatic campaign, and Treasury's campaign did not impose binding obligations on participants.[250]

Termed the "intellectual architect"[251] behind the diplomatic campaign, then-Under Secretary Levey and his successors recognized the benefits of appealing directly to foreign private banks, rather than approaching them indirectly by making contacts with their governments. Foreign governments might refuse or be reluctant to pressure their own banks into following U.S. policy, particularly when the policy imposes high costs on banks and lacks legitimacy with domestic publics or the governments themselves. By approaching the private sector directly, the United States avoids putting foreign governments in the position of having to choose sides. Former Treasury Secretary Paulson has gone further and suggested that direct diplomacy is more effective than the traditional approach because foreign banks may actually induce foreign governments to spring into action: "Such voluntary implementation by the private sector in turn makes it even more palatable for governments to impose similar measures, thus creating a mutually reinforcing cycle of public and private action."[252] Other U.S. officials view direct diplomacy with the private sector as more efficient. In the words of Condoleezza Rice, "The private sector has proved 'quicker to respond' than governments."[253]

As far as the public record shows, such diplomatic targeting of foreign banks is unprecedented.[254] Between 2005 and 2008, Treasury officials made extensive use of it: they "made overtures" to 145 banks in sixty countries.[255] In some instances, such as in the United Arab Emirates, they scheduled repeat visits to the same

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248. For instance, OFAC officials met with Bahraini bank officials of Ahli United Bank, *id.*, as well as with bank officials of Kuwait Finance House. *Terrorist Finance: Summary of OFAC Director Werner's Meetings with Kuwaiti Banks*, WIKILEAKS (Sept. 28, 2005, 1:11 PM), https://www.wikileaks.org/plusd/cables/05KUWAIT4230_a.html.

249. As one former Treasury official later stated, "I would say that [Stuart Levey's] engagement over the last couple of years was probably more with bank CEOs and board members than it was with government counterparts." Aspen Institute, *ASF 2011: Financing Terror*, YOUTUBE (July 30, 2011), http://www.youtube.com/watch?v=GaTrnbmBUMg (beginning at 26:20); *see also* FEAVER & LORBER, *supra* note 14, at 35–40.

250. Exec. Order No. 13,224, § 7, 3 C.F.R. 789 (2002) ("The Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, is hereby authorized to take such actions . . . and to employ all powers granted to the President by IEEPA and UNPA as may be necessary to carry out the purposes of this order.").

251. Serrat, *supra* note 174, at 42.

252. Remarks by Sec'y Paulson, *supra* note 186.

253. Wright, *Stuart Levey's War*, *supra* note 109.

254. Loeffler, *supra* note 129, at 106 (quoting Under Secretary for Terrorism and Financial Intelligence Stuart Levey describing the campaign as "unprecedented, high-level outreach to the international private sector").

255. KATZMAN, IRAN SANCTIONS 2013, *supra* note 161, at 24.

country.[256] Described by one journalist as "Stuart Levey's War,"[257] Levey himself made more than eighty foreign trips on his own, meeting with more than sixty different foreign bank officials.[258] After Levey's departure from Treasury for the private sector, Treasury officials continued this practice of direct outreach. In 2010, for instance, they conducted three weeks of meetings with senior government officials and bank regulators, as well as the CEOs of private banks in countries including Bahrain, Ecuador, Lebanon, and Turkey.[259]

The limited information available suggests that these meetings served as channels for sharing classified information and to signal the priority the U.S. government was giving to its Iran policy.[260] To make their case to foreign banks,[261] Treasury officials, for instance, produced data showing that Bank Sepah had requested foreign banks to strip its transactions of any identifying information, such as the bank's name, in the attempt to secure access to the U.S. financial system.[262] They also showed documents tracing the transfer of $50 million from the Iranian Bank Saderat through a London subsidiary to a charity affiliated with Hezbollah in Lebanon.[263]

Why have foreign banks cooperated with the U.S. government's diplomatic outreach in the absence of a legal directive? Treasury officials offer one possible explanation: the meetings they organize make banks aware of the reputational risks involved in dealing with Iran. As Levey stated, "All the banks we've talked to are reducing significantly their exposure to Iranian business . . . . It's been a universal response. They all recognize the risks—some because of what we've told them and some on their own. You don't have to be Sherlock Holmes to see the dangers."[264] Paulson echoed that sentiment: "As a result of our outreach and targeted measures, financial institutions around the world are more sensitive than ever about the very substantial risks posed by doing business with Iran."[265] Paulson continued, "For the

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256. *Id.*

257. Wright, *Stuart Levey's War*, *supra* note 109.

258. *Id.* Treasury Secretary Henry Paulson also met with foreign bank executives in the United States, including at the annual World Bank and IMF meeting. Loeffler, *supra* note 129, at 106.

259. Press Release, U.S. Dep't Treasury, Treasury Concludes Three Weeks Of Global Engagement With Governments, Private Sector on Iran (Aug. 20, 2010), *available at* http://www.treasury.gov/press-center/press-releases/Pages/tg835.aspx.

260. FEAVER & LORBER, *supra* note 14, at 35–36; Kittrie, *supra* note 9, at 816; *see also* Serrat, *supra* note 174, at 42.

261. Treasury officials shared this type of information with foreign governments as well, in an effort to solicit cooperation.

262. *See* Cooney, *supra* note 137, at 8 (describing how Treasury officials used data of the transactions of the Iranian government to persuade foreign banks to cut off their business with Iran); Loeffler, *supra* note 129, at 109. This is an example where the government's objective of following the money served its goal of stopping the money.

263. Wright, *Stuart Levey's War*, *supra* note 109.

264. Robin Wright, *Iran Feels Pinch as Major Banks Curtail Business*, WASH. POST, Mar. 26, 2007, at A10. One State Department official stated, "It's the most direct and aggressive stuff we've got going. It delivers." Wright, *Stuart Levey's War*, *supra* note 109. Henry Paulson further claims, "This is one of the most powerful actions that can be taken, short of military action." *Id*.

265. Remarks by Sec'y Paulson, *supra* note 186.

most part, they are not legally required to take these steps but they have decided, as a matter of prudence and integrity, that they do not want to be the bankers for such a regime."[266] U.S. officials emphasize that foreign banks are moving away from Iran based on self-interest rather than legal obligation.

While diplomatic meetings frequently provided foreign banks with new and concrete information about ongoing illicit transactions, which may very well have triggered banks' reputational and market-access concerns, the mere occurrence of such meetings may have been as important as their actual content. The willingness of Treasury officials to fly across the globe to meet personally with foreign bank leaders sent an unmistakably clear, if unspoken, signal that the United States was serious about its policy to isolate Iranian banks and Iran more generally. According to one journalist, "One of the main unspoken messages of the visits, experts say, is that the United States government may eventually bar American banks from working with financial institutions doing business with groups tied to terrorism."[267] Treasury officials, however, deny making any kind of implicit threat. In Paulson's words, "We never threaten . . . . We talk about how important it is not to violate the rules and engage in illicit transactions."[268]

At least some foreign bank executives, however, viewed their meetings with Treasury officials not as friendly efforts at persuasion, as Paulson intimates, but as a form of coercive diplomacy. In this view, direct diplomacy served as an implicit threat that if the banks did not fall in line by cutting their ties with their Iranian partners, the United States would take some form of punitive action.[269] There is evidence to support this view. In 2011, for instance, Treasury officials met with representatives of the four largest Chinese banks to dissuade them from doing business with Iran's shipping industry. Treasury officials warned that if the banks maintained their business ties, they might be cut off from the U.S. market.[270]

Whether motivated by direct market pressure or concerns about reputational risk, some foreign bank officials, despite cooperating with the United States, are resentful. One European diplomat stated, "[Foreign bank officials are] not happy with what's happening . . . . They complain about U.S. pressure, but accept it. They hope it will pass soon."[271] Officials from Dubai expressed similar frustration. According to the Central Bank governor, "Sometimes, yes, we feel that the United States is asking too much."[272] In private discussions, bankers at Standard Chartered put it more bluntly: "You f—ing Americans. Who are you to tell us, the rest of the world, that we're not going to deal with Iranians."[273]

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266. *Id.*

267. Weisman, *Financial Isolation*, *supra* note 246. Weisman goes on to note that the diplomatic campaign has been "backed up" by specific actions such as the legal measures discussed in the previous section. *Id.*

268. Wright, *Stuart Levey's War*, *supra* note 109.

269. *See id.* ("Foreign bankers, however, insisted that threats were always implicit.").

270. Serrat, *supra* note 174, at 42.

271. Wright, *Stuart Levey's War*, *supra* note 109.

272. *Id.* The official continued, "They want results to happen immediately, yesterday instead of today or tomorrow. They are demanding. This is what I said to Stuart Levey: 'You shouldn't expect it can produce miracles in a short time.'" *Id.*

273. Lawrence G. Baxter, *A Current Assessment of Some Extraterritorial Impacts of the*

D. Multilateralism in Disguise?

On important questions of national security, the three harnessing tactics comprise a dollar unilateralism strategy that appears to be effective in shaping foreign bank incentives under some circumstances (Iran) but not others (SWIFT).[274] Rather than defining efficacy broadly as whether the ultimate objectives of the government's policy are served, this Article prefers a narrow definition focused on the extent to which the government's harnessing strategy has influenced foreign banks.

In the case of Iran, dollar unilateralism has been credited with driving foreign banks to cut ties with the Iranian regime, and has arguably pressured the Iranian government into negotiations over its nuclear weapons policy.[275] Without more and better data about the precise identity of the banks, it is admittedly difficult to establish conclusively that foreign banks were responding to U.S. policy. Yet, the evidence available indicates that the U.S. strategy had a strong influence on foreign banks. For instance, as the government was incrementally withdrawing U-turn exemptions and conducting direct diplomacy between 2006 and 2008, the number of foreign banks operating in Iran dropped by more than half, from forty-six to twenty.[276] This steep decline has led one scholar to describe the government's harnessing strategy, and specifically its use of financial leverage to isolate targeted countries, as the closest it has come to the "Holy Grail."[277] Anecdotal evidence also suggests the efficacy of harnessing.[278] One journalist noted, for instance, that French

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Dodd-Frank Act with Special Focus on the Volcker Rule and Derivatives Regulation, 5 KOREAN J. BANKING & FIN. L. 3, 12 n.41 (2012) (quoting Order Pursuant to Banking Law § 39 at 5, *In re* Standard Chartered Bank, N.Y. Branch (N.Y. Dep't of Fin. Servs. Aug. 6, 2012), *available at* http://online.wsj.com/public/resources/documents/SCBorder0806.pdf), *available at* http://scholarship.law.duke.edu/faculty_scholarship/2707/.

274. I focus on the efficacy of the government's overall harnessing strategy, rather than the individual tactics. It would be difficult to assess the three tactics' individual efficacy, given that, in the case of Iran and North Korea, the government has implemented them concurrently. Nonetheless, there is evidence suggesting that each of the three tactics works. For evidence on financial sticks and high-profile blacklists, see *supra* text accompanying notes 155–162 and 170–178, respectively. One piece of evidence that direct diplomacy influenced foreign bank executive calculations regarding their ties with Iran came from a 2005 meeting between OFAC officials and executives of the Bahraini bank, Ahli United Bank (AUB). In this meeting, AUB bank officials stated that AUB would divest itself of its one-third interest in Future Bank (a different bank, which had plans of investing in Iran) "before jeopardizing its access to the dollar clearing system." WIKILEAKS, *Ambassador's Meeting*, *supra* note 247.

275. *See* INT'L CRISIS GRP., MIDDLE EAST REPORT NO. 138, SPIDER WEB: THE MAKING AND UNMAKING OF IRAN SANCTIONS 19–33 (2013) [hereinafter SPIDER WEB].

276. Steven R. Weisman, *Oversight Group Warns World About Iran's Banking System*, N.Y. TIMES, Dec. 8, 2008, http://www.nytimes.com/2008/02/28/world/asia/28iht-iran.5.10555242.html; *see also* KATZMAN, IRAN SANCTIONS 2013, *supra* note 161, at 24 ("The program convinced at least 80 foreign banks to cease handling financial transactions with Iranian banks.").

277. Kittrie, *supra* note 9, at 789.

278. For additional anecdotal suggestions that foreign firms have complied with U.S. harnessing policy in the case of Iran, see, e.g., Thomas Erdbrink & Colum Lynch, *Iran's Shipping Industry Wilts Under Sanctions; Western Insurers, Abiding by U.S. Laws, Withhold Coverage*, WASH. POST, July 21, 2010, at A13; Glenn R. Simpson & John R. Wilke, *Sanction*

banks stopped offering letters of credit for trade involving Iran and quotes an oil refiner as stating that "it is today impossible more or less in Europe, with a couple of exceptions, to get a letter of credit."[279] Banks in the United Arab Emirates also reportedly refused to issue letters of credit.[280] "The momentum," another journalist claims, "surprised even Levey."[281]

One explanation for the apparent effectiveness of dollar unilateralism is that it is simply multilateralism in disguise.[282] Treasury officials state that they have gone to great lengths to secure the cooperation and support of foreign governments.[283] Both the European Union and U.N., for instance, have imposed restrictive conditions on Iran that surely contributed to that country's isolation.[284] Although it is undeniable that international support has strengthened the impact of U.S. policies, it would be a mistake to assume that U.S. harnessing is simply a form of masked multilateralism for two reasons.

First, U.N. sanctions on Iran have been much narrower than U.S. restrictions, and those sanctions that are in place were largely a product of U.S. influence.[285] The European Union's "restrictive measures,"[286] while more extensive than U.N. sanctions, have not influenced Iranian banks at every juncture. For example, after being blacklisted by Treasury, Bank Saderat's correspondent bank relationships reportedly fell from twenty-nine to eight.[287] As one researcher noted, this is a telling sign that banks were being influenced specifically by Treasury's policy, since neither

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Threat Prompts Big Firms to Cut Iran Ties, WALL ST. J. E. EDITION, Jan. 31, 2006, at A3.

279. Mark Trevelyan, *More Companies Suspend Business with Iran*, INT'L HERALD TRIB. (U.K.), Jan. 17, 2008, at 15.

280. *Id.*

281. Wright, *Stuart Levey's War*, *supra* note 109.

282. Government officials disagree on whether U.S. policy even qualifies as unilateralism, with some arguing that it has undermined the U.N., and others insisting that it has buttressed U.N. policy. *See* Hakimi, *supra* note 5, at 140 nn.215 & 217 (citing a French official's perspective that unilateralism is circumventing U.N. policies and a U.S. official's statement that unilateral action is complementing U.N. policies).

283. "One of the things that we work on very hard is to bring together international consensus, international coalitions in the exercise of financial pressure, in part because it makes it that much more effective, and in in [sic] part so that we do not encounter any pulling back from the U.S. financial system." Mauldin, *supra* note 125.

284. The most important of these restrictive measures was enacted by the European Union in January 2012, imposing a comprehensive embargo on the purchase, import, or transportation of Iranian crude oil, petroleum, and petrochemical products. This embargo made it exceedingly difficult for tankers transporting Iranian oil to obtain private insurance. Jeffrey J. Schott, *Economic Sanctions Against Iran: Is the Third Decade a Charm?*, 47 BUS. ECON. 190 (2012). SWIFT, under pressure from the European Union—which itself was arguably under U.S. pressure—also barred the Central Bank of Iran and more than twenty Iranian banks from using SWIFT messaging services for their international transactions. Giri Rajendran, *Financial Blockades: Reserve Currencies as Instruments of Coercion*, *in* THE POWER OF CURRENCIES AND CURRENCIES OF POWER 87, 94 (Alan Wheatley ed., 2013); *see also* SPIDER WEB, *supra* note 275, at 13–14.

285. *See* SPIDER WEB, *supra* note 275, at 14–15.

286. The European Union uses the terms "sanctions" and "restrictive measures" interchangeably. *Sanctions Policy*, EUROPEAN UNION EXTERNAL ACTION, http://eeas.europa.eu/cfsp/sanctions/index_en.htm.

287. Jacobson, *supra* note 191, at 76–77.

the U.N. nor the European Union placed any kind of restrictions on Bank Saderat.[288] Moreover, even when E.U. courts have invalidated specific designations of Iranian banks,[289] there is no evidence to suggest that European banks have considered reestablishing business connections with Iranian entities. European banks may of course have refrained, expecting the European Union to simply redesignate the Iranian banks.[290] But even without such designations, European banks would be unlikely to revive business ties given that U.S. policies are still in effect.[291]

Second, and perhaps most importantly, when important governments have resisted U.S. policy, the United States has—even while attempting to secure their cooperation—used dollar unilateralism to circumvent them. For instance, possessing strong ties to Iran, Turkey has explicitly stated that it has no intention of adhering to unilateral U.S restrictions. On the brink of being targeted for a new wave of direct diplomacy by the U.S. government, the Turkish Trade Minister criticized the United States for pressuring Turkish banks and stated his opposition in unyielding terms: "[W]e cannot tolerate it."[292] The Chinese government has also publicly and repeatedly opposed the government's "wanton unilateralist practice."[293] Other countries have expressed no more than reluctant support, most likely the result of quiet coercion.[294] As the United Arab Emirates' minister of economy Sheikha Lubna al Qasimi explains, the United Arab Emirates' and Iran's economic ties are longstanding and run deep. "At the end of the day, Iran is a neighbor."[295]

Underscoring what makes harnessing foreign banks so appealing to the U.S. government, in each of these cases—Turkey, China, and the United Arab Emirates—foreign banks have claimed that, in contrast to their governments' positions, they are adhering to U.S. regulations. Turkish bankers have noted in

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288. *Id.*

289. *E.g.*, Joined Cases T-4/11 & T-5/11, Export Development Bank of Iran v. Council, 2013 O.J. (C 304) 11; Case T-494/10, Bank Saderat Iran v. Council, 2013 O.J. (C 79) 12; Case T-13/11, Post Bank Iran v. Council, 2013 O.J. (C 304) 13; Case T-15/11, Sina Bank v. Council, 2012 EUR-Lex CELEX LEXIS 661 (Dec. 11, 2012); Case T-390/08, Bank Melli Iran v. Council, 2009 E.C.R. II-3967.

290. *See* Benoît Faucon & Laurence Norman, *EU Shifts Tactics to Bolster Iran Sanctions*, WALL ST. J., Oct. 28, 2013, at A9.

291. *See* James Kanter, *Iran Ruling in Europe Draws Anger from U.S.*, N.Y. TIMES, Sept. 7, 2013, at A4.

292. Jay Solomon & Marc Champion, *U.S. Approaches Turkey on Iran Sanctions*, WALL ST. J., Oct. 19, 2010, at A13.

293. *MOFCOM Says China Opposes Recent US Sanctions*, POL'Y & REG. REP., Feb. 15, 2013 (article on file with the Indiana Law Journal).

294. For instance, following the State Department's threat that it would designate the United Arab Emirates as a country that provides nuclear technology to Iran (a "destination of diversion concern"), the United Arab Emirates began to support U.S. policies and U.N. sanctions. This support was not merely rhetorical. The U.A.E. government adopted new measures restricting ties with Iran, including tightening customs regulations and pressuring its own banks to comply with both U.S. and U.N. policies. Kambiz Foroohar, *Dubai Helps Iran Evade Sanctions as Smugglers Ignore U.S. Laws*, BLOOMBERG (Jan. 25, 2010, 5:27 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=av5smtYe_DDA.

295. Farnaz Fassihi & Chip Cummins, *Cat and Mouse: Iranians Scheme to Elude Sanctions*, WALL ST. J., Feb. 13, 2008, at A1.

private conversation that Turkish banks with U.S. shareholders have "cut back sharply" their ties with Iran.[296] Chinese lawyers have reported that Chinese companies, especially banks, are taking significant measures to comply with U.S. laws. One lawyer in Shanghai pointed to the example of an Iranian company that was unable to invest in China because local banks refused to open an account for it.[297] Even in Dubai, referred to as "Iran's offshore business center,"[298] banks have been cutting back. For example, one large Dubai-based bank announced that, in response to U.S. policies, it was closing down all accounts with Iranian banks.[299]

Nevertheless, it is important not to overstate the effectiveness of the government's new harnessing strategy in influencing the decisions of foreign banks. Although the government's dollar unilateralism has influenced some foreign bank dealings with North Korea, it is a less powerful strategy than in the Iran case, partly because North Korean banks are not as integrated into global financial markets.[300] Furthermore, the SWIFT case demonstrates that the three tactics of dollar unilateralism do not always work. In that particular case, the United States had minimal financial leverage since SWIFT is not a traditional bank that accepts deposits or issues credit. High-profile blacklisting would have backfired because SWIFT's reputation hangs on its commitment to data privacy and banking secrecy. Although direct diplomacy appears to have been effective in eliciting SWIFT's support under the right circumstances, its limitations became evident once the intelligence operation was made public.[301]

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296. Jay Solomon & Marc Champion, *U.S. Envoy to Meet with Iran's Neighbors*, WALL ST. J., Oct. 19, 2010, 12:01 AM, http://online.wsj.com/articles/SB10001424052702303496104575560240107312672.

297. Raymond Barrett & Joy C. Shaw, *New Iran Sanctions Increases OFAC Compliance Burden for Chinese Companies*, POL'Y & REG. REP., Jan. 23, 2013.

298. Foroohar, *supra* note 294 (quoting Afshin Molavi, a fellow at the Washington-based New America Foundation).

299. Chip Cummins & Jay Solomon, *U.A.E. Cuts off Ties to Iran Banks*, WALL ST. J., Oct. 6, 2010, 12:01 AM, http://online.wsj.com/article/SB10001424052748703298504575534041013995702.html.

300. Kittrie, *supra* note 9, at 793. Other reasons for the limits of unilateralism in the North Korea case are that, compared to Iran, North Korea is less susceptible to domestic pressure, *see* Stephan Haggard & Marcus Noland, *Sanctioning North Korea: The Political Economy of Denuclearization and Proliferation* 22–23 (Peterson Inst. for Int'l Econ., Working Paper No. WP 09-4, 2009) ("The North Korean economy is indeed becoming more open, but the leadership remains highly ambivalent about this development and about reform more generally and has shown little interest in economic carrots as a result."), and more invested in maintaining its nuclear program, *see* FEAVER & LORBER, *supra* note 14, at 10. The fact that U.S. and U.N. policies have not been as numerous or aggressive toward North Korea as toward Iran may also be a factor. *See* GO MYONG-HYUN, ASAN INST. FOR POLICY STUDIES, ISSUE BRIEF NO. 82, NORTH KOREA AS IRAN'S COUNTERFACTUAL: A COMPARISON OF IRAN AND NORTH KOREA SANCTIONS (2013), *available at* http://en.asaninst.org/wp-content/uploads/2014/03/IssueBrief_82.pdf.

301. Of the three tactics, the efficacy of direct diplomacy is the most difficult to assess. Information about what goes on in closed-door meetings is difficult to come by. Yet, direct diplomacy allows for narrowly tailoring policy to each context, which may help explain Treasury's enthusiasm for using it.

III. Implications

Dollar unilateralism offers insights for both domestic and international law scholars working on U.S. security. It challenges the widespread assumption in international legal scholarship that, in the case of cross-border security threats, globalization has rendered unilateralism increasingly obsolete. Instead, drawing on lessons from the cases of Iran, North Korea, and SWIFT, I propose three conditions that likely influence the efficacy of harnessing foreign private actors.

Yet even when effective, dollar unilateralism raises unresolved political accountability concerns, both at home and internationally. Rather than offer an aggregate normative assessment, I suggest the government's precise tactics matter. For domestic affairs, accountability concerns are more acute when the government's tactics are legally informal. By contrast, in international affairs, informal tactics allow for specific forms of foreign government influence and oversight, but favor powerful states that already have some leverage over the United States. These tactics, moreover, still fall short of international and multilateral legal processes, which are better able to secure U.S. accountability to weaker actors, even as they are themselves no panacea. I thus argue that dollar unilateralism is a powerful strategy under specific conditions, yet also opens the door to new accountability gaps, both domestically and internationally.

A. Conditions for Efficacy

The efficacy of dollar unilateralism is conditional. As before, I use a narrow definition of efficacy, focusing on the government's ability to influence foreign banks, and foreign firms more generally.[302] I highlight three factors that are likely to influence policy efficacy: the structure of the industry that the government seeks to harness; the international acceptability of the government's policy goals that harnessing aims to serve; and bargaining asymmetries between the government and the industry targeted for harnessing.

First, effectiveness of the government's new unilateral strategy depends partly on the structure of the industry. Placed at the center of the global economy, finance is of primary importance to the functioning of international and national markets, comparable perhaps only to telecommunications and energy. Banks, for instance, have greater access to and influence over foreign private actors than do multinational corporations in manufacturing. Indeed, in the Iran case, the U.S. government has been able to use the centrality of the U.S. finance sector to disrupt two other pivotal markets: oil and insurance.[303] In the banking industry, moreover,

302. *See supra* text accompanying note 274. Therefore, this Part does not address a whole set of interesting questions related to efficacy, including the ability of the government to lift sanctions once imposed, the potential for foreign government retaliation against U.S. policy, or emulation of it, and broader questions about the efficacy of relying on targeting national economies (or particular sectors) as a strategy to pressure nondemocratic regimes.

303. *See* Rajendran, *supra* note 284, at 94–95 (noting that banking restrictions buttressed restrictions on both the insurance and oil sectors). For a discussion of how banking is deeply connected to these industries, see *id.* at 94–96. It is worth noting that the importance of industry structure depends partly on the nature of the targeted entity or regime and its own

sensitivity to reputational risk arguably provides a vital channel cementing further cross-border connections and aligning bank interests with the government's policy objectives.[304] Thus, even when the executive branch granted waivers to countries in the process of reducing their oil dependency on Iran, foreign banks still refrained from processing such transactions. The banks deemed both the reputational risks and the compliance costs too high.[305]

With its extensive reach over foreign private actors, the telecommunications industry is also positioned at the center of the global economy. This makes organizations like SWIFT and telecommunications giants like Google or Verizon appealing targets for harnessing. Yet, as the SWIFT case illustrates, telecommunication companies have reputational pressures to protect consumer privacy that may differ from the pressure on banks, and telecommunication incentives can thus clash with the government's surveillance agenda. In that case, direct diplomacy worked with SWIFT officials when the surveillance operation was covert, but became less effective once the operation was exposed. High-profile blacklisting of noncooperative companies will also be less likely to lead to shaming and tainting of the company, and more likely to backfire, pushing telecom companies to publicly resist U.S. harnessing efforts.[306]

The acceptability of policy goals that the government seeks to advance is a second factor that affects the efficacy of the new U.S. unilateral strategy. When the United States pursues goals that are widely accepted by foreign governments and corporations, harnessing will be easier to implement. For instance, in contrast to its endorsement of U.S. policy on Iran, the European Union circumscribed the U.S. government's ability to harness SWIFT. U.S. surveillance operations violate strongly held European privacy norms. The European Union has therefore placed significant pressure on the United States, forcing it, in the words of one U.S. official, to make "difficult" and "substantial" concessions during negotiations about collaboration between the United States and SWIFT.[307] Under pressure from the European Union (and particularly the European Parliament), the United States now allows an E.U. official to monitor U.S. searches of encrypted data, and grants Europol (the European Union's police agency) the authority to block data transfers from Europe to the United States.[308]

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dependence on the industry. In the case of North Korea, U.S. harnessing of foreign banks may be less effective partly because North Korea is much less integrated into the global economy than most countries.

304. *See* Monica Billio, Mila Getmansky, Andrew W. Lo & Loriana Pelizzon, *Econometric Measures of Connectedness and Systemic Risk in the Finance and Insurance Sectors*, 104 J. FIN. ECON. 535, 555 (2012).

305. Rajendran, *supra* note 284, at 94.

306. In response to the 2013 disclosures of telecommunication firms' collaboration with NSA surveillance, for instance, U.S. companies have gone to great lengths to repair possible reputational damage, such as requesting the release of classified documents that may shed a more favorable light on their cooperation with government agencies.

307. *SWIFT Progress? Europe Backs New EU-US Data Sharing Deal*, SPIEGEL ONLINE (June 25, 2010, 1:42 PM), http://www.spiegel.de/international/europe/swift-progress-europe-backs-new-eu-us-data-sharing-deal-a-702841.html [hereinafter *SWIFT Progress?*]; *see also* KRISTIN ARCHICK, CONG. RESEARCH SERV., RS22030, U.S.-EU COOPERATION AGAINST TERRORISM 9–10 (2013).

308. *SWIFT Progress?*, *supra* note 307. The backlash following the exposure of the

It would be mistaken, however, to overemphasize the need for buy-in from foreign governments. Even when the United States goes to great lengths to secure the support of foreign governments,[309] the primary appeal of this new form of unilateralism lies in one simple fact: the U.S. government does not rely on foreign government support to the same extent as when it proceeds by traditional bilateral or multilateral channels. The U.S. government's reaction to European Court of Justice (ECJ) rulings invalidating E.U. designations of Iranian banks suggests this to be the case even in its relations with the European Union. On the same day that the court struck down E.U. designations on evidentiary grounds, Treasury officials employed financial sticks, adding six Iranian individuals and four new companies to its SDN list.[310]

The third feature likely to influence the efficacy of harnessing involves market-based bargaining asymmetries between the government and individual foreign firms, as well as the foreign sector more generally, which the government seeks to enlist. The government does not simply exert uniform influence over all foreign banks, relying on the carrot of market access or the stick of legal sanction. As the "too big to prosecute" experience during the financial crisis demonstrated, U.S. banks are too closely intertwined with large foreign partners for the government to deny these partner banks market access.[311] The U.S. government depends on banks like HSBC almost as much as such banks depend on U.S. markets. This interdependency constrains the government in implementing its various harnessing tactics.

U.S. dominance over global finance, moreover, does not translate equally across all sectors. Compared to finance, for example, foreign producers are less dependent on the U.S. textile, energy, or even telecommunications markets. Following recent disclosures about the NSA's spying program, some experts predicted that U.S. cloud providers would lose about ten percent of their foreign customers to European and Asian competitors.[312]

U.S.-SWIFT operation may foreshadow what is to come in the wake of the 2013 revelations of NSA spying. For example, German officials have demanded that the U.S. government enter into a formal agreement prohibiting future spying among allied countries. Furthermore, in retaliation, the European Union has threatened to cut off U.S. access to SWIFT data entirely and to withhold data about airline passengers. Adrian Croft, *EU Threatens to Suspend Data-Sharing with US over Spying Reports*, REUTERS, July 5, 2013, *available at* http://www.reuters.com/article/2013/07/05/usa-security-eu-idUSL5N0FB1YY20130705.

309. *See, e.g.*, FEAVER & LORBER, *supra* note 14, at 36; Mauldin, *supra* note 125.

310. Kanter, *supra* note 291; Press Release, U.S. Dep't Treasury, Treasury Exposes Iranian Attempts to Evade Oil Sanctions (Sept. 6, 2013), *available at* http://www.treasury.gov/press-center/press-releases/Pages/jl2158.aspx.

311. *E.g.*, Greg Farrell & Tiffany Kary, *Standard Chartered Still Faces Fed Probes After N.Y. Deal*, BLOOMBERG (Apr. 15, 2012, 1:43 PM), http://www.bloomberg.com/news/2012-08-14/standard-chartered-faces-fed-probes-after-n-y-deal.html.

312. Steven J. Vaughan-Nichols, *The Lunacy of Trying to Avoid NSA Spying by Moving E-mail and Cloud out of the US*, ZDNET (Aug. 27, 2013, 8:52 PM), http://www.zdnet.com/the-lunacy-of-trying-to-avoid-nsa-spying-by-moving-e-mail-and-cloud-out-of-the-us-7000019908. Other experts suggest that the losses could be even greater. *E.g.*, Charles Babcock, *NSA's Prism Could Cost U.S. Cloud Companies $45 Billion*, INFO. WEEK (Aug. 15, 2013, 7:47 PM), http://www.informationweek.com/cloud-computing/infrastructure/nsas-prism-could-cost-us-cloud-companies/240159980.

Because they do not operate in isolation from one another, these three factors should be considered together when evaluating the potential efficacy of the government's harnessing strategy. If the United States enjoys significant bargaining leverage over a foreign sector, it can afford to pay less attention to the international acceptability of its objectives than if its bargaining leverage is weak. For instance, U.S. attempts in the 1990s to harness foreign firms—not banks—to isolate Cuba were significantly undercut by E.U. opposition.[313] Without E.U. support, the government was unable to influence foreign firms trading with Cuba. But the Cuba case did not simply underscore the need for E.U. backing. Rather, it demonstrated the importance of international support when the United States has less bargaining power over foreign firms. Having recognized its leverage over foreign finance, the United States has become less dependent on the European Union even as it understands the political and legitimacy benefits of E.U. support.[314]

It is the interaction between these three factors, more than their independent effects, that is relevant for assessing the potential efficacy of this new unilateral strategy for addressing future transnational challenges. Regardless of where a given U.S. policy falls along each of these three factors and how the factors interact, the central point remains: despite a popular assumption that multilateral cooperation is necessary for addressing cross-border problems, the U.S. government's recent turn to foreign banks suggests that new types of unilateralism—not just dollar unilateralism, but other forms too—are possible and, under certain circumstances, effective.

B. Implications for Accountability

Dollar unilateralism, and the specific tactics the government uses to implement it, raises concerns about government accountability, both within the United States and globally.[315] I discuss these two contexts in turn. Similar to executive-private handshake agreements used for surveillance operations,[316] informal tactics enlisting foreign banks create troubling accountability gaps in domestic politics. But domestic law scholars have expressed much less concern about informal harnessing of foreign firms. This silence may stem from a lack of awareness and also from the fact that the government has, thus far, used its tactics conservatively. Furthermore, Congress and the Executive have both supported dollar unilateralism in relations with Iran and North Korea.[317] This silence is shortsighted. The tactics of dollar unilateralism may well evolve into a broader practice and the alignment of congressional-executive support may only be temporary. International law scholars have also been relatively quiet when it comes to evaluating dollar unilateralism,

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313. *Supra* notes 88–95 and accompanying text.

314. *See* Rajendran, *supra* note 284, at 98 ("Whereas the ability of the U.S. to impose biting trade sanctions has waned, the international role of the dollar, bolstered by the pivotal position of the currency within the global financial architecture, has increased the effectiveness of financial sanctions.").

315. Accountability is only one yardstick by which to assess the government's new strategy. In addition to efficacy, other dimensions include legality and legitimacy. A full normative assessment would need to consider these as well.

316. For discussion of handshake agreements, see *supra* text accompanying notes 38–44.

317. *See* Kittrie, *supra* note 9, at 789–93.

both as an overall strategy and in its individual tactics. The novelty of the government's strategy explains this silence, as does the general, if still emerging, view that dollar unilateralism is valid under international law. Until assessments of dollar and other forms of unilateralism recognize and consider carefully the diverse range of unilateral tactics the government deploys—both formal and informal—they will remain incomplete. And even as dollar unilateralism does not appear to violate international law, it subverts international legal processes of participation and consent, creating new gaps in U.S. accountability.[318]

I focus here on political accountability and adopt a definition that can be applied both domestically (from the perspective of the U.S. public) and internationally (from the perspective of other governments or their nationals). I emphasize two conditions: (1) accountability as managerial oversight, and (2) accountability as redress.[319] Managerial oversight requires that an "authoritative individual or entity" evaluates the government's actions and ensures that it obeys relevant rules.[320] It is forward-looking, ongoing, and requires access to information about policy implementation. Redress accountability requires that an authority be able to penalize the government if it violates relevant rules.[321] It is backward-looking and involves being able to sanction or seek remedy from the government for a specific act at a discrete point in time.[322] I focus specifically on legal redress.

Domestically, the government's use of informal harnessing—high-profile blacklists and direct diplomacy—diminishes managerial and redress accountability. To be sure, legal formality is no guarantee of accountability. Financial sticks, formal both in source (congressional or regulatory actions) and form (imposing binding legal obligations), have nonetheless been sharply criticized for a lack of oversight over Treasury[323] and limited access to remedy.[324] Yet, even if weak in

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318. *See* Krisch, *supra* note 62, at 24–25 (discussing how the turn to informal law, minilateralism, and unilateralism subverts "the consensual structure of international law").

319. This two-prong definition is taken from Laura A. Dickinson, *Privatization and Accountability*, 7 ANN. REV. L. SOC. SCI. 101 (2011) [hereinafter Dickinson, *Privatization*]. For comprehensive discussion of the different forms of accountability, see *id.* at 109–11 (defining democratic, contractual, and internal institutional accountability), and Robert O. Keohane, *The Concept of Accountability in World Politics and the Use of Force*, 24 MICH. J. INT'L L. 1121, 1130–34 (2003) (defining eight accountability mechanisms: hierarchical, supervisory, electoral, fiscal, legal, market, participatory, and public reputational accountability). For a critique of these understandings as overly broad, *see* Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AM. J. INT'L L. 211, 252–55 (2014).

320. Dickinson, *Privatization*, *supra* note 319, at 103.

321. *Id.*

322. The two forms of accountability interact but are independent: redress accountability may have a deterrent effect and promote managerial accountability, and managerial accountability may encourage mechanisms of redress. *Id.*

323. *E.g.*, Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Non-Custodial Prevention*, 99 CORNELL L. REV. 327, 336–44 (2014); Vanessa Ortblad, Comment, *Criminal Prosecution in Sheep's Clothing: The Punitive Effects of OFAC Freezing Sanctions*, 98 J. CRIM. L. & CRIMINOLOGY 1439 (2008).

324. *See generally*, *e.g.*, LAWYERS' COMM. FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, THE OFAC LIST: DUE PROCESS CHALLENGES IN DESIGNATION AND DELISTING (2014)

practice, in theory at least, the formal nature of financial sticks provides for de jure mechanisms of both oversight and redress.[325]

By contrast, high-profile blacklists—formal in source, but not content[326]—allow for some managerial accountability, but limited redress accountability. Section 311 of the Patriot Act provides for ex ante accountability partly by including a list of jurisdictional and institutional factors that Treasury must consider when blacklisting an entity or region, and by requiring Treasury to issue a finding that describes the alleged activities of the blacklisted entity and the jurisdictional factors that it considered in reaching its finding.[327] Treasury, moreover, is required to publish in the Federal Register its finding and notice of proposed rulemaking, and to consider comments before proceeding to use a financial stick in the form of a final rule that imposes special measures.[328] Paradoxically, the very features that enhance Treasury's managerial accountability—ensuring that Treasury's findings are widely publicized and open to public scrutiny—are what constitute the act of blacklisting in the first place. Thus, while requirements for public scrutiny may increase Treasury's accountability, they also inflict immediate damage on the designated entity as it comes under the public spotlight. As with financial sticks, section 311's oversight mechanisms can arguably be criticized for being quite weak, but not for lacking such mechanisms entirely.

The more pressing problem with high-profile backlists concerns access to redress.[329] Even though Treasury, when blacklisting, simply names an entity

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(discussing the limited access to remedy for entities listed as Specially Designated Global Terrorists). In Europe, similar critiques about lack of evidentiary basis have led the ECJ to invalidate a range of designations, but with little practical effect: the European Union redesignated banks under a broader category, making evidentiary challenges even more difficult. *See supra* note 289 and accompanying text.

325. Under the Administrative Procedure Act (APA), "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (2012).

326. As a reminder, this Article defines high-profile blacklisting as the simple act of naming an entity though a proposed rulemaking, without the additional, optional step of imposing special measures though adoption of a final rule (which would be a financial stick). It is thus formal in source (section 311 of the Patriot Act), but not content (no legally binding obligations).

327. 31 U.S.C. § 5318A(c) (2012).

328. *Id.* § 5318A(a)(3). Compared to that of financial sticks, the managerial accountability of high-profile blacklists is weaker. For instance, under section 311 of the Patriot Act, Treasury is not required to consult with other federal agencies at the first step of blacklisting an entity as a primary money-laundering concern. But the provision does mandate such consultations when Treasury decides to, at the second step, deploy a financial stick through the imposition of special measures—either at the time a proposed rulemaking is issued (for up to 120 days), or after a final rulemaking. Treasury must "consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, . . . the Secretary of State, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the National Credit Union Administration Board," and other agencies the Treasury deems appropriate. *Id.* § 5318A(a)(4)(A).

329. The relative difficulty of redress for informal actions is evident in BDA's decision to file a petition alleging violations of the APA and constitutional due process only for Treasury's 2007 final rule designating BDA as a primary money-laundering concern, even though BDA made clear in its petition that the monetary damage of Treasury's actions occurred following its 2005 blacklisting, two years before the final rule was issued. Its

without adopting a final rule, U.S. and foreign banks have been quick to cut off ties with the blacklisted bank. Without Treasury formally requiring them to do so (as in the case of financial sticks), it is more difficult for a blacklisted bank (or its business partner) to obtain legal redress and repair its reputation for two reasons: (1) the blacklisted bank (or its business partners) may have a harder time establishing that it has been harmed, and that Treasury caused the harm, than if Treasury had required banks to cut business ties by issuing a final rule;[330] and (2) the blacklisted entity may have a harder time getting equitable relief, as it cannot ask courts to invalidate the final rule since no final rule was issued.[331] By contrast, with a formal obligation requiring U.S. entities to cut ties, a blacklisted entity can request that a court invalidate Treasury's final rule. It can thus use the court to send a signal that it has been unjustifiably turned into a "financial pariah."[332]

From the perspective of political accountability, direct diplomacy is more problematic than high-profile blacklists since its informal nature in source and content makes the achievement of both managerial and redress accountability particularly difficult. In contrast to financial sticks and high-profile blacklists, no formal laws or regulations detail the jurisdictional or institutional factors that Treasury must consider when engaging in direct diplomacy. There are no requirements that Treasury announce that it is holding meetings, much less disclose the content of the meetings, and no opportunities for public feedback or commentary. Additionally, since Treasury does not impose legal obligations on foreign banks when it conducts direct diplomacy, there is no basis for formal redress either, whether by an entity that is targeted by Treasury for participating in such meetings, or by an entity that is the topic of such meetings.

Dollar unilateralism also presents important challenges to U.S. managerial and redress accountability at the global level. The traits that make these tactics so appealing for the U.S. government render them problematic internationally: they enable the United States to circumvent traditional international and multilateral legal processes of participation and consent, such as those at the U.N.[333] To be sure, one could defend the government's tactics on grounds that they are valid under

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petition focused on the final rule most likely because proving injury and obtaining equitable relief is easier with Treasury's formal action. *See* Complaint ¶ 33, Banco Delta Asia, S.A.R.L. v. Fin. Crimes Enforcement Network, No. 1:13-cv-00333 (D.D.C. Mar. 14, 2013).

330. To establish standing, the blacklisted entity must demonstrate that it was harmed and that the agency caused the harmful actions of the third party. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 78 (1978). Courts are cautious to hold agencies accountable for "the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Lujan*, 504 U.S. at 562 (quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 615 (1989)) (internal quotation marks omitted). Although a blacklisted entity may have indeed suffered injury by a third-party bank, this harm was triggered due to the Treasury's *preliminary* finding and *proposed* rulemaking. Because Treasury had yet to take any final action against the blacklisted entity, it may have a more difficult time establishing that it has been harmed because of Treasury's action.

331. Standing also requires that the injury be redressable by the relief sought. *Lujan*, 504 U.S. at 561.

332. ZARATE, TREASURY'S WAR, *supra* note 118, at 53; *see also supra* Part II.B.

333. This move away from international legal processes is part of a broader trend among states. *See generally* Krisch, *supra* note 62.

international law in both substance and procedure.[334] Although intended to influence foreign private actors, the U.S. government's use of financial sticks is based on territorial connections and does not clearly contravene jurisdictional rules.[335] International law, moreover, does not prohibit governments from simply naming foreign entities as posing criminal risks, nor does it forbid governments from launching systematic diplomacy campaigns with foreign private actors, either at home or abroad. One could further point to substantial international and multilateral support for U.S. policy on Iran and North Korea.[336] The U.N. Security Council, for instance, has arguably implicitly authorized governments to take such measures against these two countries.[337]

But it would be mistaken to equate the legality of the U.S. policies and the presence of multilateral support with political accountability. International legality is neither "the final arbiter of legitimacy"[338] nor the uncompromising guarantor of accountability. Even conceding its legality under international law, the U.S. government's avoidance of international multilateral procedures limits managerial and redress accountability, albeit to varying degrees. Different from the domestic context, tactics that are legally formal in source—financial sticks and high-profile blacklists—weaken the government's managerial accountability in the international context: foreign governments are ill positioned to evaluate, much less to influence, ex ante U.S. legislative and regulatory processes that seek to deploy foreign banks for national security purposes, except when the U.S. government invites them into the process.

Informal tactics, by contrast, allow for at least some managerial accountability since the Executive has more flexibility in deciding whether, when, and how to implement its policy. With direct diplomacy, for instance, the U.S. government has generally engaged foreign government officials, requesting their permission to hold

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334. Some might suggest that U.S. economic restrictions violate WTO law, but others could point to the national security exception. *See* Shailja Singh, *WTO Compatibility of United States' Secondary Sanctions Relating to Petroleum Transactions with Iran* 2–4 (Ctr. for WTO Studies, Working Paper No. CWS/WP/200/1, 2012), *available at* http://wtocentre.iift.ac.in/workingpaper/Iran%20Sanctions.pdf.

335. While some nonetheless consider U.S. policies extraterritorial, *see, e.g.*, Alex Lakatos & Jan Blöchliger, *The Extraterritorial Reach of U.S. Anti-Terrorist Finance Laws*, 3 GESKR 344 (2009) (Ger.), *available at* http://www.mayerbrown.com/files/Publication/bc828278-4516-41ea-bc07-5cbcf909be56/Presentation/PublicationAttachment/6746390a-c4f7-46fe-afb3-0a9b3cc7cccb/05_Lakatos_Bloechliger.pdf, the U.S. government refutes this position. As David Cohen, Treasury's Under Secretary for Terrorism and Financial Intelligence, stated in a 2014 interview, "None of our authorities are extraterritorial. They all operate on U.S. institutions and U.S. persons and activity in the United States." Mauldin, *supra* note 125.

336. *See* Krisch, *supra* note 62, at 23 (noting that the U.S. government's use of financial sticks "could raise concerns on jurisdictional grounds . . . [y]et the permissive regime of Financing Convention and SC resolutions, coupled with favourable political circumstances, seems to have led to widespread acquiescence").

337. This view would be consistent with the notion of "channeled unilateralism," in which the multilateral system uses unilateralism as an enforcement mechanism for international law. *Supra* note 64 and accompanying text.

338. Alvarez, *Multilateralism and its Discontents*, *supra* note 63, at 393.

meetings with foreign bank executives.[339] In theory, foreign officials can prohibit such meetings on their territory or insist on being present.

Although at the global level the United States is generally more accountable for its informal rather than formal tactics, this accountability is still weaker than the managerial accountability that can be established by multilateral institutions, despite the fact that these institutions have important accountability gaps of their own.[340] At multilateral venues such as the U.N. and the FATF, foreign governments may question and evaluate U.S. proposals; in response the United States must, at minimum, articulate a rationale for its policies, justify its selection of targets, and engage in bargaining and debate.[341] By contrast, when dealing with dollar unilateralism, foreign governments may be able to influence U.S. tactics only in a piecemeal and ad hoc fashion. Their ability to do so, moreover, will be a function of leverage over the United States: powerful states may be able to push back on U.S. tactics, while weaker states will be hard pressed to resist. When powerful states support dollar unilateralism, the mechanisms for U.S. accountability globally become even more elusive. While scholars and policymakers may be reassured by E.U.-U.S. alignment on foreign policy issues, from the perspective of weaker states, E.U.-U.S. alignment likely renders the possibility of accountability ever more remote.

Compared to accountability established at the U.N., redress accountability in the United States is also limited, for both foreign nationals and foreign governments. Redress for foreign entities is particularly difficult with respect to the government's informal tactics. But its formal tactics also are relatively difficult to challenge. By contrast, the U.N. Security Council, for all its limitations,[342] has responded to

339. *See* FEAVER & LORBER, *supra* note 14, at 28.

340. For scholarship discussing accountability gaps of multilateral institutions, see generally Marieke de Goede, *Blacklisting and the Ban: Contesting Targeted Sanctions in Europe*, 42 SECURITY DIALOGUE 499 (2011) (critiquing the European Union); Hayes, *supra* note 47 (critiquing FATF); Elizabeth Clark Hersey, Note, *No Universal Target: Distinguishing Between Terrorism and Human Rights Violations in Targeted Sanctions Regimes*, 38 BROOK. J. INT'L L. 1231 (2013) (critiquing the U.N.). For critiques of multilateral organizations from the perspective of "disregard," rather than accountability, see generally Stewart, *supra* note 319; see also *id.* at 229 (critiquing U.N. sanctioning and listing procedures).

341. Stewart terms this as "reason giving" and views it as a mechanism to allow weaker actors—those who are disregarded by multilateral decision-making processes—to understand, evaluate, and address the actions of decision makers. Stewart, *supra* note 319, at 264–65. Even when the United States has been the driving force behind U.N. policies on Iran and North Korea, it has not been able to push its views and interests at every juncture: U.N. restrictive measures are much narrower than those in the United States. Joy Gordon, *Crippling Iran: The U.N. Security Council and the Tactic of Deliberate Ambiguity*, 44 GEO. J. INT'L L. 973, 984 (2013), and, during U.N. debates, countries have both challenged and resisted U.S. attempts to expand them. *See* Willem van Kemenade, *China vs. the Western Campaign for Iran Sanctions*, WASH. Q., July 2010, at 99 (2010) (discussing opposition by China, Turkey, and Brazil).

342. For example, the U.N. Oil-for-Food Program, enacted to allow the Iraqi government to exchange oil for food and medical supplies, was ultimately marred by corruption. Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 516–17 (2011) (discussing the U.N. Oil-for-Food Program); s*ee also* Stewart, *supra* note 319, at 229 (critiquing the lack of

public criticism by attempting to improve access to remedy to those injured by its sanctions policies.[343] And compared to the United States, the U.N. has gone to significantly greater lengths in implementing reforms.[344] Foreign governments could conceivably file claims at the WTO or International Court of Justice against the United States, but since U.S. tactics are not in clear violation of international law, such action would be unlikely to get very far.

The perceived legality of U.S. tactics and widespread support for U.S. goals of isolating Iran and North Korea and tracking illicit financial flows may be, paradoxically, the greatest barrier to U.S. political accountability, both domestically and internationally. Criticism has been scarce, and the United States has not had to defend its methods—despite the fact that some actors are now paying a very heavy humanitarian price,[345] and that such methods would likely be viewed as deeply troubling if implemented on a broad scale.

This discussion of weak U.S. accountability is not a pollyannaish call for discarding dollar unilateralism, an innovative and powerful strategy. Rather it highlights an urgent need to debate and perhaps institutionalize procedures that mitigate emerging gaps in U.S. accountability in both domestic and global contexts.[346] While calls for accountability, for other issues, may well be "ever-present mantras,"[347] and "all the rage,"[348] in the case of dollar unilateralism, they are far too rare. And while public debate is hardly an answer, it is a first step both for engaging the government about dollar unilateralism and for evaluating the need to establish new mechanisms that provide some form of oversight.

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procedural safeguards in U.N. sanctions and refugee policies); Hersey, *supra* note 340 (discussing human rights issues linked to U.N. sanction policy).

343. *See, e.g.*, Craig Forcese & Kent Roach, *Limping into the Future: The U.N. 1267 Terrorism Listing Process at the Crossroads*, 42 GEO. WASH. INT'L L. REV. 217, 221–27 (2010); Stewart, *supra* note 319, at 223. For recent reforms made in response to litigation, including the requirement that a summary of reasons for listing a person or entity must be provided to the listed person or entity, see *id.* at 243–52. Information about U.N. delisting procedures, including a timeline of changes to the delisting procedures and statistics regarding delisting requests, can be found on the U.N. website. *Focal Point for De-listing Established Pursuant to Security Council Resolution 1730 (2006)*, UN SECURITY COUNCIL SANCTIONS COMMITTEES, http://www.un.org/sc/committees/dfp.shtml.

344. The United States has only one regulation that allows a person to seek administrative reconsideration of their designation. 31 C.F.R. § 501.807 (2014). A person seeking delisting does not have access to evidence used by OFAC in its decision to designate, is not afforded a hearing, and although the person will receive a written decision containing OFAC's disposition, there is no timeframe by which OFAC must make its decision. *Id*. The same point can be made with respect to FATF's blacklisting campaign, which, despite being "extraordinarily effective," FATF ended in response to widespread criticism. Krisch, *supra* note 62, at 24; *see also* Rainer Hülsse, *Even Clubs Can't Do Without Legitimacy: Why the Anti-Money Laundering Blacklist Was Suspended*, 2. REG. & GOVERNANCE 459 (2008).

345. *See supra* notes 12–13 and accompanying text.

346. *See* Krisch, *supra* note 62, at 31–33 (discussing the need for procedural mitigation in response to the ongoing shift away from consent-based international law).

347. Stewart, *supra* note 319, at 213.

348. *Id.* at 244.

CONCLUSION

Since 9/11, the U.S. government has effected a profound shift in its national security strategy: it has harnessed foreign banks in the pursuit of vital security goals. This shift introduces "dollar unilateralism" as a new mode for projecting U.S. power. Dollar unilateralism raises questions about how the government enlists foreign banks, especially those with weak or no ties to U.S. markets. Drawing on examples such as Iran's nuclear weapon policies, the Article argues that the U.S. government has used its central position in global finance to enlist foreign banks in its effort to isolate targeted entities and track illicit financial flows. Relying on the special status of the U.S. dollar as the world's reserve currency, the government has deployed three novel formal and informal legal tactics: financial sticks, high-profile blacklists, and direct diplomacy. Dollar unilateralism is effective under three conditions related to industry structure, policy acceptability, and bargaining asymmetry. Ultimately, dollar unilateralism challenges a widespread assumption about the increasing necessity of multilateral cooperation and raises new concerns about the government's political accountability, both domestically and globally.