

“The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China’s Culpability”

United States Senate  
Committee on the Judiciary

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Chairman Graham, Ranking Member Feinstein, and Members of the Committee, thank you for the opportunity to testify today. My name is Chimène Keitner. I am a member of the California, Ninth Circuit, and Supreme Court Bars, and I hold a chair in international law at the University of California Hastings College of the Law in San Francisco. I have also served proudly as Counselor on International Law to the Legal Adviser at the Department of State. As Counselor, I worked closely with counterparts in the Department of Justice, the Department of Defense, and the National Security Council on core national security and foreign relations matters, including litigation involving foreign sovereign immunity. Among other affiliations, I serve as an advisor on foreign sovereign immunity for the American Law Institute’s Fourth Restatement of U.S. Foreign Relations Law. I offer this testimony solely in my personal capacity and not on behalf of any organization.

My remarks today describe the legal framework and practical implications of foreign sovereign immunity provided *by*—and *to*—the United States. Several proposals before this body would place these important protections under serious threat, and would harm rather than help the American people. In my oral and written testimony, I will do my best to explain what is at stake, and why these immunity-stripping proposals are fundamentally misguided. I hope to leave you with three main points:

- (1) The United States has more to lose than any other country by removing the shield of foreign sovereign immunity for a pandemic;
- (2) Private litigation will not bring China to the negotiating table, and it will not produce answers or compensation for U.S. victims; and
- (3) Congress should focus on the inadequate federal response to COVID-19, and on restoring U.S. leadership in global public health.

Let me be clear at the outset: I am not here to defend China. My purpose in joining you today is to help protect the United States. My points are not unique, and they should not be controversial.

They should also not be viewed as partisan. Andrew McCarthy and Dan McLaughlin have each written scathing rebuttals of immunity-stripping proposals in the *National Review*.<sup>1</sup> John Bellinger, who served as State Department Legal Adviser to President

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<sup>1</sup> McCarthy opined: “This is foolish on so many levels it is tough to know where to begin.” <https://www.nationalreview.com/2020/04/the-foolish-gop-proposal-to-open-china-to-american-lawsuits-over-covid-19/>; McLaughlin called Missouri AG Eric Schmitt’s lawsuit “bad law and bad policy.” <https://www.nationalreview.com/2020/04/missouris-misguided-lawsuit-against-china/>. I do not agree with all of

George W. Bush, warned in the *Washington Post* that “[i]f Congress repeals China’s sovereign immunity in the heat of this election year, the U.S. government is likely to regret it later”<sup>2</sup>—which is also my first main point. He predicted that “[e]ven if Congress were to strip China of its immunity, lawsuits against China are unlikely ever to result in payments to Americans injured by covid-19”<sup>3</sup>—for reasons I will discuss under my second point. And he advised that “[a]ssertive U.S. diplomatic action is more likely to produce meaningful results than politically attractive, but ultimately feckless, lawsuits and battles over sovereign immunity.”<sup>4</sup> My colleague Mr. Bellinger and I part ways on other issues, but I agree entirely with his assessment here.

I elaborate on these three points below.

### **(1) The United States Has More to Lose Than Any Other Country By Removing the Shield of Foreign Sovereign Immunity for a Pandemic**

If you don’t work at the State Department or in the Office of Foreign Litigation, it can be easy to underestimate the crucial role of foreign state immunity in protecting U.S. interests worldwide. Simply put, the unparalleled reach of United States activity in every corner of the globe leaves us uniquely exposed to capricious action by foreign litigants in foreign courts. This is particularly true for exceptions to immunity that could apply to the United States, and that could be invoked or enforced by countries where the United States holds significant assets.

The United States benefits disproportionately from immunity from two types of foreign jurisdiction: jurisdiction to adjudicate claims involving our sovereign activities, and jurisdiction to attach and execute on governmental assets to satisfy adverse judgments. These types of immunity are firmly established as a matter of customary international law, which we have played a role in creating. However, because customary international law is heavily influenced by state practice, denying immunity to other states in our courts erodes the protections we can claim in their courts. It could also prompt a “copycat” effect, and invite reciprocal lawsuits in countries where valuable U.S. assets are located. Because of our global footprint, we have the most to lose from weakened immunity rules. Not surprisingly, I have not seen any serious international lawyer express support for immunity-stripping legislation in the context of a global pandemic.

Even though I worked at the State Department, I am not an immunity absolutist. Unlike Mr. Bellinger, I think there can be value in private litigation, particularly when individual officials commit international crimes.<sup>5</sup> However, I am an immunity pragmatist,

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McCathy’s or McLaughlin’s reasoning, but I concur in their conclusions about these lawsuits and the proposed legislation.

<sup>2</sup> <https://www.washingtonpost.com/opinions/2020/04/23/suing-china-over-coronavirus-wont-help-heres-what-can-work/>

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Keitner, *Prosecute, Sue or Deport? Transnational Accountability in International Law* (2015), [https://scholarship.law.upenn.edu/penn\\_law\\_review\\_online/vol164/iss1/1/](https://scholarship.law.upenn.edu/penn_law_review_online/vol164/iss1/1/); Keitner, *The Three C’s of Jurisdiction Over Human Rights Claims in U.S. Courts* (2015), [https://repository.law.umich.edu/mlr\\_fi/vol113/iss1/2/](https://repository.law.umich.edu/mlr_fi/vol113/iss1/2/); Keitner, *Germany v. Italy and the Limits of Horizontal Enforcement: Some Reflections from a United States Perspective* (2013), [https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2095&context=faculty\\_scholarship](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2095&context=faculty_scholarship); Keitner,

especially when it comes to foreign states themselves. Of all the tools in your toolkit, dismantling foreign state immunity is the one you should be most unwilling to deploy. In most circumstances, doing so would violate international law. The more expansive the exceptions, and the more they could also apply to alleged U.S. conduct, the worse off we will be.

Foreign state immunity in U.S. courts is governed by statute. In 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA), largely at the State Department's urging. Supreme Court jurisprudence makes clear that the FSIA "indisputably governs the determination of whether a foreign state is entitled to sovereign immunity" from civil suit.<sup>6</sup> Under the statute, a "foreign state" includes political subdivisions and agencies and instrumentalities of foreign states, as well as companies that are majority-owned by foreign states.<sup>7</sup> Federal and state courts in the United States only have jurisdiction over claims against foreign states if those claims fall within an enumerated exception to the statute.<sup>8</sup>

As I explained in an invited blog post that is appended to this written testimony, some of the early private lawsuits filed in U.S. courts against China for COVID-19 failed to grasp this basic principle.<sup>9</sup> I will not repeat that analysis here, because the outcome is so clear: under current U.S. law, there is no civil jurisdiction over China, or any Chinese governmental entity, for damages arising from China's governmental misconduct in concealing or failing to prevent the spread of COVID-19. Simply parroting the language of FSIA exceptions to immunity does not make those exceptions apply. Similarly, characterizing damages actions as consumer protection or antitrust actions, rather than tort suits, does not affect the underlying immunity analysis. It also raises additional questions, such as the extraterritorial application of state consumer protection and antitrust laws, that go beyond the scope of my testimony here.

These are not harmless errors. By my count, at least fourteen private lawsuits have been filed to date, not including litigation by Missouri and Mississippi.<sup>10</sup> Eleven of these are styled as class actions, with expansive class definitions that would make even a seasoned plaintiff's lawyer's eyes pop out of her skull. I am concerned that these futile actions may provide false hope to those facing hardship, rather than addressing their immediate economic needs.

The more recent innovation of naming the Chinese Communist Party (CCP) as a defendant does not circumvent sovereign immunity for reasons I explored in a second appended blog post.<sup>11</sup> To be clear: this does not mean that China or the Communist Party are blameless. Far from it. The public record regarding their actions and omissions is damning, even without venturing into conspiracy theories. In a functioning democracy, the failure of China's local, provincial, and national leaders would be just cause for replacing

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*Transnational Litigation: Jurisdiction and Immunities* (2013),

<https://www.oxfordhandbooks.com/view/10.1093/law/9780199640133.001.0001/law-9780199640133-e-34>

<sup>6</sup> <https://www.supremecourt.gov/opinions/09pdf/08-1555.pdf>

<sup>7</sup> <https://www.law.cornell.edu/uscode/text/28/1603>

<sup>8</sup> <https://www.law.cornell.edu/uscode/text/28/1603>

<sup>9</sup> Keitner, *Don't Bother Suing China for Coronavirus* (Mar. 31, 2020), <https://www.justsecurity.org/69460/dont-bother-suing-china-for-coronavirus/>

<sup>10</sup> See Table 1. My thanks to UC Hastings Law student Lindsey Berger for compiling this chart.

<sup>11</sup> Keitner, *Missouri's Lawsuit Doesn't Abrogate China's Sovereign Immunity* (Apr. 22, 2020), <https://www.justsecurity.org/69817/missouris-lawsuit-doesnt-abrogate-chinas-sovereign-immunity/>

them at the ballot box. But the claims in the sixteen pending lawsuits are not the type of allegations that have ever been deemed suitable for resolution in domestic courts. The COVID-19 crisis does not change that.

## **(2) Private Litigation Will Not Bring China to the Negotiating Table, and It Will Not Produce Answers or Compensation for U.S. Victims**

Amending the FSIA to allow civil suits to go forward would not result in obtaining compensation, and would likely make that goal more difficult to achieve. The last thing this country needs are protracted court battles and reciprocal discovery about which country's or state's bungled response caused more direct and avoidable harm to U.S. claimants.<sup>12</sup> If these claims were actually litigated, it would provide attorneys for China with a captive audience to catalogue the shortcomings in U.S. local, state, and federal responses to a threat that was reportedly highlighted by the intelligence community in the President's Daily Brief as early as mid-January.<sup>13</sup>

Calls to hold China responsible contrast sharply with President Trump's effusive praise of China's response to the pandemic, which he has also lavished on China in other areas. For example, in November 2019, President Trump stated: "We have to stand with Hong Kong, but I'm also standing with President Xi. He's a friend of mine. He's an incredible guy."<sup>14</sup> On January 24, 2020, well after news of the coronavirus became public, the President tweeted: "The United States greatly appreciates [China's] efforts and transparency. It will all work out well. In particular, on behalf of the American People, I want to thank President Xi."<sup>15</sup> On February 7, President Trump tweeted that Xi was "strong, sharp and powerfully focused on leading the counterattack on the Coronavirus."<sup>16</sup> The President speaks on behalf of the United States, and his remarks can and will be cited in U.S. courts in China's defense.

Although today's hearing focuses on foreign sovereign immunity, that is not the only barrier to recovering damages from China in U.S. courts. An even bigger problem is causation. China's failure to contain the novel coronavirus might well be what we call a "but for" cause of any given injury in the United States. But the causal chain has dozens, if not hundreds, of additional links.<sup>17</sup> To take but one example: if I attend a funeral in Mississippi and contract coronavirus, does China owe me damages, or am I entitled to compensation from the asymptomatic or pre-symptomatic carrier who, for whatever reason,

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<sup>12</sup> A recent Congressional Research Service report provides a timeline of China's documented actions and omissions in December 2019 and January 2020: <https://crsreports.congress.gov/product/pdf/R/R46354>. The National Security Action group has also compiled a useful timeline: <https://nationalecurityaction.org/coronavirus-timeline>.

<sup>13</sup> [https://www.washingtonpost.com/national-security/presidents-intelligence-briefing-book-repeatedly-cited-virus-threat/2020/04/27/ca66949a-8885-11ea-ac8a-fe9b8088e101\\_story.html](https://www.washingtonpost.com/national-security/presidents-intelligence-briefing-book-repeatedly-cited-virus-threat/2020/04/27/ca66949a-8885-11ea-ac8a-fe9b8088e101_story.html)

<sup>14</sup> <https://www.washingtonpost.com/business/2019/11/22/trump-says-he-might-veto-legislation-that-aims-protect-human-rights-hong-kong-because-bill-would-impact-china-trade-talks/>

<sup>15</sup> <https://www.washingtonpost.com/politics/2020/05/07/when-trump-covered-chinas-alleged-coronavirus-coverup/>

<sup>16</sup> *Id.*

<sup>17</sup> Professor Jacques deLisle notes: "Chances that courts will find for plaintiffs on such claims, and more conventional ones as well, are further diminished by their need to base liability on the complex, lengthy, and indirect causal chains that link the alleged failings of actors in China to harms in the United States, and arguments that those harms were reasonably foreseeable consequences of the defendants' actions in China." <https://www.fpri.org/article/2020/05/pursuing-politics-through-legal-means-u-s-efforts-to-hold-china-responsible-for-covid-19/>

did not wear a mask?<sup>18</sup> Recent proposals to immunize businesses from liability for failing to take reasonable precautions to protect employees and customers also send a mixed message about taking responsibility for the consequences of one’s actions. China might have left the barn door open, but we sat idle for far too long and watched the approaching stampede.

Two standard arguments in favor of civil liability do not translate well in the nation-state context. First, the massive evidentiary problems in establishing causation sufficient to award damages means that litigation would not, in fact, force China to “internalize the costs” of insufficient domestic regulation.<sup>19</sup> Second, it would not bring China to the negotiating table. To the contrary, China’s pivot to “wolf-warrior diplomacy”—however self-defeating it might be for China—means that excessively confrontational approaches will make it harder, not easier, for China to play a constructive role in repairing the damage wrought by the spread of this virus.<sup>20</sup>

Contrary to some suggestions, this situation is a far cry from the 1930’s *Trail Smelter* arbitration between the United States and Canada, which involved compensation claims by farmers from Washington state for economic losses suffered as a result of pollution created by a privately owned factory located 18 miles away, in British Columbia. The resulting decision is often cited in support of holding countries liable for transboundary environmental harm if the resulting injury is established by “clear and convincing evidence”<sup>21</sup>—a proposition that the United States has not accepted with respect to the global environmental damage caused by carbon emissions and other pollutants emanating from U.S. territory. Even if we accept this proposition—which would probably be good for the planet—it is ill-suited for application by domestic courts in situations of complex causation.

Professor John Knox, the first U.N. Special Rapporteur on Human Rights and the Environment, noted in a chapter for Professor Russell Miller and Professor Rebecca Bratspies’s important volume on the *Trail Smelter* case: “Despite the fact that the pollution was understood to come only from one emitter, affected a relatively small area, and had been studied intensively for nearly a decade before the tribunal was constituted, the tribunal took another five years to decide how much damage the smelter had caused and to impose a control regime on it.”<sup>22</sup> The dispute was not, in fact, about Canada’s failure to regulate. Rather, it arose because the Washington farmers, unlike their Canadian counterparts, did not have standing to sue in Canada under Canadian law, and the Washington State long-arm statute did not provide jurisdiction over a factory in Canada.<sup>23</sup> In an effort to smooth diplomatic relations with its incensed neighbor to the South, and under intense domestic political pressure, Canada consented to stipulate its responsibility

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<sup>18</sup> This example is not entirely far-fetched. See *Mississippi Gov Says He Should Have Worn Mask at Funeral* (June 18, 2020), <https://apnews.com/89b7faf058ff97d0d53ece6cfc1a54c>

<sup>19</sup> As Robert Williams, Executive Director of Yale Law School’s Paul Tsai Center, explained: “On any standard you’re going to have to present evidence of the wrongful act, which presents its own set of challenges, and you’re going to have to prove proximate causation, which can be difficult when you have intervening factors contributing to the spread of the virus in the U.S., including most notably failures by the U.S. government to take appropriate measures to protect public health after it had information about the virus.”

<https://www.brookings.edu/podcast-episode/dont-count-on-suing-china-for-coronavirus-compensation/>

<sup>20</sup> <https://thediplomat.com/2020/05/interpreting-chinas-wolf-warrior-diplomacy/>

<sup>21</sup> [https://legal.un.org/riaa/cases/vol\\_III/1905-1982.pdf](https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf)

<sup>22</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=665682](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=665682)

<sup>23</sup> I am grateful to Professor Rebecca Bratspies for these insights.

for the pollution.<sup>24</sup> The arbitral tribunal thus did not have to determine the question of Canada’s state responsibility or lack thereof for the cross-border pollution—it simply assumed it for purposes of resolving the other aspects of the case.

For these reasons, although my colleague Professor Miller attributes great significance to this decision as a linchpin in the case against China, I do not share that view.<sup>25</sup> In the context of this hearing, it is also worth remembering that the barrier to domestic litigation in that case was not immunity, because the real party in interest was not a foreign state.

The five years of dueling expert evidence in *Trail Smelter* would pale beside any similar battle in litigation against China for COVID-19. Based on my reading of the public record, it appears we still don’t know precisely where or how the novel coronavirus originated.<sup>26</sup> It is an oversimplification to assert, as Professor Miller did in April, that “[i]f China just maintained an adequate food safety regulatory regime, the harm wouldn’t have been spread.”<sup>27</sup> A recent study in the *Lancet* suggests that a seafood market in Wuhan province might not have been the source of the virus after all, and highlights “[m]ajor gaps in our knowledge of the origin, epidemiology, duration of human transmission, and clinical spectrum of disease.”<sup>28</sup> From a still-unconfirmed source in China, the virus began spreading via international travel. Genomic studies show that most New York coronavirus cases came from Europe.<sup>29</sup> The New York City outbreak, in turn, became the “primary source of infections around the United States.”<sup>30</sup> Meanwhile, additional genomic studies indicate that Washington state’s coronavirus outbreak was not necessarily caused by a direct introduction from China, and might instead have come—in an echo of *Trail Smelter*—via British Columbia, Canada.<sup>31</sup>

On a broader level, if Congress sees fit to embrace expansive principles of state responsibility for transboundary harm, and an accompanying duty to compensate anyone even remotely affected by a state’s misconduct on its own territory, then it will need to rewrite much more than the FSIA. As two scholars wrote on the blog of the European Journal of International Law:

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<sup>24</sup> As Professor Knox recounts: “[I]n 1934 ... the State Department suggested that the governments agree on, or allow an international tribunal to set, a maximum standard for transboundary emissions of sulfur dioxide. But after the Canadian Department of External Affairs pointed out that such a standard would prohibit industrial activity on the U.S. side of the border as well, the State Department responded that its proposal was limited to the Trail smelter, that it did not contemplate the ‘establishment of any principles,’ and that it was neither desirable nor necessary to make the case into a precedent.” *Id.* In his view, “[t]hat *Trail Smelter* has never been followed by similar cases is one of the great roads not taken in the modern history of international law.” Of course, this does not preclude future legal development, including in the form of binding commitments under international environmental law treaties.

<sup>25</sup> <https://www.justsecurity.org/69398/chinas-responsibility-for-the-global-pandemic/>

<sup>26</sup> We also do not yet appear to know with certainty where the 2009 H1N1 influenza pandemic originated, further illustrating the problem of establishing causation, let alone attributing it to the policies of a particular nation-state. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4957980/>

<sup>27</sup> <https://www.voanews.com/usa/americans-join-coronavirus-lawsuit-make-china-pay>

<sup>28</sup> [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30183-5/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30183-5/fulltext)

<sup>29</sup> <https://www.nytimes.com/2020/04/08/science/new-york-coronavirus-cases-europe-genomes.html>

<sup>30</sup> <https://www.nytimes.com/2020/05/07/us/new-york-city-coronavirus-outbreak.html>

<sup>31</sup> <https://www.seattletimes.com/seattle-news/health/genetic-analysis-raises-more-questions-about-the-history-of-washington-states-coronavirus-outbreak/>

The COVID-19 outbreak ticks all th[e] boxes [of the no-harm principle]: it is now scientifically proven and widely known that it causes widespread and disastrous health consequences which may lead to death beyond national borders. Thus, *all States*, regardless of whether the outbreak originated in their territory, have the obligation to exercise their best efforts, to the extent permitted by their capabilities, to stop the spread of coronavirus to other countries and prevent further outbreaks.<sup>32</sup>

This global pandemic, and the collective responsibility of governments for failing to prevent its further spread, gives new meaning to the concept of “mass tort.” Inter-related claims between and against foreign governments for their respective policy failures are not suited for resolution in a U.S. district court. To illustrate the point, imagine such a case within the United States. Should California sue Connecticut for the spread of Lyme disease?<sup>33</sup> What if, hypothetically, Connecticut failed promptly to acknowledge and report the risk, fearing an impact on tourism? When it comes to transboundary harm, pollution is one matter; pandemics are another.

We are already starting to see claims against governments other than China for their pandemic response failures, which some of the immunity-stripping proposals under consideration would also allow. For example, one author has proposed legal theories for holding the Dutch government liable in Dutch courts.<sup>34</sup> Moreover, under both domestic and international law, injured parties have a duty to mitigate their losses. The United States has failed abjectly in this duty, as evidenced by our disproportionate rate of COVID-19 deaths, not just COVID-19 cases.<sup>35</sup> According to a recent study, a comparison of the fatalities in and policies of the U.S., South Korea, Australia, Germany, and Singapore indicates that “between 70% and 99% of the Americans who died from this pandemic might have been saved by measures demonstrated by others to have been feasible.”<sup>36</sup>

Other countries could also start bringing claims against the United States on the very same theories that have been invoked by U.S. advocates of bringing claims against China. Consider the alleged misconduct of the Chinese government: delay in responding to a known epidemiological threat;<sup>37</sup> allowing (or even convening) mass gatherings;<sup>38</sup> lack of transparency in recording and reporting infection rates among the population;<sup>39</sup> failing to

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<sup>32</sup> <https://www.ejiltalk.org/part-i-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/>

<sup>33</sup> <https://www.cdc.gov/lyme/stats/maps.html>

<sup>34</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7156574/>

<sup>35</sup> <https://www.washingtonpost.com/world/2020/06/19/countries-keeping-coronavirus-bay-experts-watch-us-case-numbers-with-alarm/>

<sup>36</sup> <https://www.statnews.com/2020/06/19/faster-response-prevented-most-us-covid-19-deaths/> International lawyer Henning Lahmann points out that, in its 1997 ruling in the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice held that “an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided.” <https://www.lawfareblog.com/does-china-really-owe-world-trillions-dollars>

<sup>37</sup> See, e.g., *Timeline of the Coronavirus Pandemic and U.S. Response*

<https://www.justsecurity.org/69650/timeline-of-the-coronavirus-pandemic-and-u-s-response/> (updated through May 7, 2020)

<sup>38</sup> <https://www.npr.org/2020/06/20/881270479/6-trump-staffers-test-positive-for-covid-19-ahead-of-tulsa-rally> (in-person campaign events)

<sup>39</sup> <https://www.reuters.com/article/us-health-coronavirus-trump-numbers-anal/trumps-focus-on-coronavirus-numbers-could-backfire-health-experts-say-idUSKBN20W16E> (statement by President Trump that “I like the numbers being where they are”); <https://www.washingtonpost.com/nation/2020/06/20/coronavirus-live-updates-us/> (statement by President Trump that “I said to my people, ‘Slow the testing down, please!’”)

share important public health information with other countries;<sup>40</sup> and hoarding Personal Protective Equipment (PPE).<sup>41</sup> As President Trump recently wrote to the World Health Organization Director-General: “Perhaps worse than all these failings is that we know that the [WHO] could have done so much better. ... Many lives could have been saved had you followed [your predecessor’s] example.”<sup>42</sup> The same could be said of the U.S. response.<sup>43</sup>

I would be glad to provide more extensive analysis of the proposed bills in response to Questions for the Record, but let me offer a few preliminary thoughts here. Senator Cotton’s bill would provide an additional exception to foreign sovereign immunity for claims arising from the spread of COVID-19 and “a tortious act or acts, including acts intended to deliberately conceal or distort the existence of nature of COVID-19.”<sup>44</sup> It is unclear whether this proposal includes a new cause of action. Either way, this is precisely the kind of allegation that could be levied against the authorities of multiple countries, including the United States.

For example, professor and attorney Lucas Bergkamp notes that “[i]n the early days of the COVID-19 breakout, the Dutch government’s objective was not the protection of public health; rather, it was the prevention of public concern so as to avoid economic disruption.”<sup>45</sup> Russia is reportedly undercounting its coronavirus death toll.<sup>46</sup> Indonesia has provided little transparency or information on the spread of COVID-19.<sup>47</sup> The list goes on and on. Without foreign state immunity, litigation against all of these countries—and others—would pile up in U.S. courts. And that’s without taking into account obstacles to cross-border discovery, constitutional challenges to the exercise of personal jurisdiction over foreign defendants, and the massive diplomatic headaches these cases would invariably cause, with little prospect of actual recovery.

Senator Hawley’s proposal would go even further by creating an exception to immunity from attachment and execution, and by allowing pre-judgment injunctions related to “the transfer or disposal of assets.”<sup>48</sup> There is no better recipe for a mass exodus of foreign investment from the United States, and a reciprocal run on U.S. assets worldwide in satisfaction of judgments obtained under parallel statutes enacted by foreign states. The 20-year statute of limitations in Senator Hawley’s bill means that my youngest child could sue China after she graduates from college for loss of earning capacity caused by the disruption to her kindergarten education.<sup>49</sup> If she prevailed at trial—which she would not,

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<sup>40</sup> <https://www.statnews.com/2020/05/31/cutting-ties-with-world-health-organization-endangers-global-public-health/>

<sup>41</sup> <https://www.latimes.com/politics/story/2020-04-07/hospitals-washington-seize-coronavirus-supplies>

<sup>42</sup> <https://www.whitehouse.gov/wp-content/uploads/2020/05/Tedros-Letter.pdf>

<sup>43</sup> <https://www.foreignaffairs.com/articles/2020-03-28/ebola-should-have-immunized-united-states-coronavirus>

<sup>44</sup> <https://www.congress.gov/116/bills/s3662/BILLS-116s3662is.pdf>

<sup>45</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7156574/>

<sup>46</sup> <https://www.themoscowtimes.com/2020/05/08/russia-is-boasting-about-low-coronavirus-deaths-the-numbers-are-deceiving-a70220>

<sup>47</sup> <https://www.hrw.org/news/2020/04/09/indonesia-little-transparency-covid-19-outbreak>

<sup>48</sup> <https://www.congress.gov/116/bills/s3674/BILLS-116s3674is.pdf>

<sup>49</sup> The more limited carve-out in Senator Blackburn’s bill would create an exception to jurisdictional immunity for any foreign state that is alleged to have discharged a “biological agent” that caused harm to a U.S. national, whether such discharge was intentional or unintentional. It defines the term “biological agent” but does not define the term “discharge.” It seems that the cause of action would come from 18 U.S.C. § 2333, which covers violent acts that would violate U.S. criminal law and that appear to be intended to intimidate or coerce a

for the reasons described above—it’s far from clear that enforcing a judgment against China would be in the U.S. interest, were that even possible. It might come as a surprise to some that terrorism-related judgments often end up being paid from funds in the U.S. Treasury, even if they formed part of a negotiated settlement.<sup>50</sup>

There are also strong arguments that seizing Chinese assets or imposing other measures designed to serve as “reparations” would cause greater economic harm to the United States than to China.<sup>51</sup> Litigation would also put even more pressure on what the Center for New American Security identified as a “foundational principle” in its Congressionally-mandated study on China, namely, that “U.S. strategy must be both comprehensive and coordinated across multiple domains.”<sup>52</sup> For all these reasons, I agree with the assessment offered by Doug Bandow, a senior fellow at the Cato Institute and former special assistant to President Ronald Reagan, that “making China pay would cost Americans dearly.”<sup>53</sup> Moreover, as Bandow cautions, “Beijing’s failings do not excuse the West, and the United States especially, for wasting months when officials should have been preparing for the arrival of COVID-19.”<sup>54</sup> We often say that charity begins at home. Accountability should begin at home, too. Ensuring domestic accountability lies squarely within the mandate—and responsibility—of Congress.

### **(3) Congress Should Focus on the Inadequate Federal Response to COVID-19, and on Restoring U.S. Leadership in Global Public Health**

A crisis of this proportion demands that we focus on actions that will actually help the American people. This does not mean that Congress must ignore China entirely. For example, the Li Wenliang Global Public Health Accountability Act “seeks to punish foreign officials responsible for suppressing information about international health crises.”<sup>55</sup> And as a House co-sponsor affirmed, government officials deserve condemnation and should face consequences for “demonstrat[ing] that they care more about maintaining their grip on power than the health and wellbeing of their people.”<sup>56</sup> I also support the call for an independent international investigation,<sup>57</sup> although to date the United States has ceded

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civilian population. How this would work in practice is unclear, since there is no such thing as “unintentional” terrorism under this provision. <https://www.congress.gov/116/bills/s3592/BILLS-116s3592is.pdf>

<sup>50</sup> <https://crsreports.congress.gov/product/pdf/IF/IF10341>

<sup>51</sup> See, e.g., Veronique de Rugy, *Should China Pay Reparations?* (May 7, 2020),

<https://www.aier.org/article/should-china-pay-reparations/>

<sup>52</sup> <https://www.cnas.org/press/press-note/cnas-responds-coronavirus-outbreak-tests-u-s-national-security-capabilities>

<sup>53</sup> <https://foreignpolicy.com/2020/05/05/trump-pandemic-making-china-pay/>; see also Ryan Haas, *Clouded Thinking in Washington and Beijing on COVID-19 Crisis* (May 4, 2020) (observing that “[t]he cold reality is that America’s response is undermining the very objectives it purports to be pursuing”)

<https://www.brookings.edu/blog/order-from-chaos/2020/05/04/clouded-thinking-in-washington-and-beijing-on-covid-19-crisis/>; Luke Moffett, *Why Calls for Reparations from China for Coronavirus Are an Unfeasible Distraction* (June 9, 2020) (noting that “claiming reparations against a particular organisation and not others can also be a cynical way to deflect attention from the responsibility of those making the claim”)

<https://theconversation.com/why-calls-for-reparations-from-china-for-coronavirus-are-an-unfeasible-distraction-139684>.

<sup>54</sup> Bandow, *supra* note 53.

<sup>55</sup> <https://www.hawley.senate.gov/hawley-cotton-curtis-gallagher-introduce-li-wenliang-global-public-health-accountability-act>

<sup>56</sup> *Id.*

<sup>57</sup> Cf. <https://www.hawley.senate.gov/senator-hawley-announces-bill-hold-chinese-communist-party-responsible-covid-19-pandemic>

global leadership on this issue to Australia and the European Union.<sup>58</sup> Resolutions criticizing China’s actions may also be appropriate in certain circumstances, and can perform an important signaling function that can get lost in the noise of protracted litigation.<sup>59</sup>

More importantly, however, we need to attend to the immediate needs of the American people. Domestically, this means prioritizing an “all of government” response guided by science and divorced, as much as possible, from electoral politics. Internationally, this means establishing a new vision for U.S. leadership—not by force, but by example. As a report from the Center for American Progress reminds us, “[i]n past crises of this nature, the United States has historically assumed the part of quarterback.”<sup>60</sup> The United States has abdicated that role here.

Senator Durbin’s proposed resolution calling for global cooperation and U.S. leadership recognizes this important role and would set us on the path to restoring it.<sup>61</sup> We also need to show the world that we are capable of constructive self-examination. Legislation that would establish a bipartisan 9/11 Commission-style panel—such as that from Representative Schiff and a forthcoming bill from Senator Feinstein—would not only begin to fulfill an obligation of good governance to the American people. It would also show the world that we are confident enough, and candid enough, to confront a crisis without resorting to the kind of concealment and buck-passing more often associated with authoritarian regimes.

## Conclusion

This is a time of confusion, grief, uncertainty, and even anger for everyone. Blaming China for every harm arising from the coronavirus pandemic might seem appealing as a political and emotional matter, but it does not help Americans who are currently suffering, and it will cause long-term harm to our national interests. When Executive Branch officials fail in their duty to protect this country and the people in it, we the American people look to you, the first branch of government, to hold those officials accountable.

I hope you have found the information I provided relevant and useful. But I also hope that you will press “pause” on the international blame game, which could jeopardize U.S. strategic, financial, and diplomatic interests, and focus instead on taking concrete steps that will actually benefit Americans by protecting their lives and livelihoods.

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<sup>58</sup> <https://www.reuters.com/article/us-health-coronavirus-who-resolution/eu-resolution-on-pandemic-adopted-at-who-assembly-official-idUSKBN22V1RS>

<sup>59</sup> Targeted sanctions can also be an effective tool if used judiciously, although some recent invocations of the International Economic Emergency Powers Act (IEEPA) to promulgate sanctions have, in my view, exceeded the intended purpose of that statute. Congress also has other important tools at its disposal. Importantly, as my UC Hastings colleague Professor Zachary Price has emphasized in the context of funding the World Health Organization, “[b]ecause annual appropriations require Presidents to come back each year seeking new funding for their priorities, Congress holds leverage each year to override or modify presidential choices—and it should use that leverage here and in other areas to keep unilateral presidential policy-making in check. Congress should also exercise oversight to compel greater transparency from the administration about its legal theories and foreign policy goals.” <https://www.acslaw.org/expertforum/can-president-trump-defund-the-who/>

<sup>60</sup> <https://www.americanprogress.org/issues/security/news/2020/03/26/482274/us-leading-global-response-coronavirus-crisis/>

<sup>61</sup> <https://www.congress.gov/116/bills/sres579/BILLS-116sres579is.pdf>

Thank you, and I look forward to your questions.

Table 1. Civil Suits Against China for COVID-19 (current as of June 8, 2020)

Alters et. al. v. People's Republic of China	3/13/20	Southern District of Florida, Miami Division	1:20-cv-21108-UU
Bourque CPA and Advisors v. People's Republic of China	3/17/20	Central District of California	8:20-cv-00597-RGK-DFM
Buzz Photos v. People's Republic of China	3/17/20	Northern District of Texas	3:20-cv-00656-K
Bella Vista LLC v. People's Republic of China	3/23/20	District of Nevada	2:20-cv-00574-JCM-NJK
Cardiff Prestige Property v. PRC	4/8/20	Central District of California	8:20-cv-00683
Aharon v. PRC	4/8/20	Southern District of Florida	9:20-cv-80604-RKA
Azalea Woods v. PRC	4/13/20	Western District of Louisiana	3:20-cv-00457-TAD-KLH
Francis Smith v. PRC	4/20/20	Eastern District of Pennsylvania	2:20-cv-01958-AB
State of Missouri v. PRC	4/21/20	Eastern District of Missouri Southeastern Division	1:20-cv-00099
Edwards v. The Country of China	4/23/20	District of South Carolina	2:20-cv-01579-CMC-MGB
Stirling v. China et al.	4/30/20	District of Oregon	3:20-cv-00713-SB
Benitez-White v. PRC et al.	5/3/20	Southern District of Texas	4:20-cv-01562
Edwards v. PRC et al.	5/8/20	Eastern District of Louisiana	2:20-cv-01393-NJB-KWR
Greco et al. v. PRC et al.	5/11/20	Eastern District of Pennsylvania	5:20-cv-02235-AB
State of Mississippi v. PRC	5/12/20	Southern District of Mississippi	1:20-cv-168-LG-RHW
Patella v. PRC et al.	5/15/20	Middle District of North Carolina	1:20-cv-00433