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Comparing the Approaches of the Presidential Candidates

Pierre-Richard Prosper
Arent Fox LLP

William W. Burke-White
University of Pennsylvania Carey Law School

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A stylized world map in shades of blue and white, overlaid on a grid of latitude and longitude lines. The map is centered on the Atlantic Ocean.

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COMPARING THE APPROACHES OF THE PRESIDENTIAL CANDIDATES

*Amb. Pierre Prosper &
William Burke-White*

Panel Discussion

COMPARING THE APPROACHES OF
THE PRESIDENTIAL CANDIDATES

*Ambassador Pierre-Richard Prosper &
William Burke-White*

MS. ANDERSEN: I am very pleased to welcome today two individuals who are representatives of the two candidates. They both want me to be very clear, they are not officially representing the campaign for the candidates, but they both have long and close ties to the two camps, and they know their positions well and will reflect them well, I am sure.

So, first, I would like to introduce, taking the position on the left here, Professor Bill Burke-White, who is Deputy Dean and Professor of Law at the University of Pennsylvania School of Law and has most recently, between 2009 and 2011, served as a member of the policy planning staff at the U.S. State Department in the Obama Administration under Secretary Clinton. And there, among many other things, he was a principal drafter of the Administration's Quadrennial Diplomacy and Development Review, so a very important document that sets out this Administration's foreign policy priorities and approach. So, Bill, go ahead and assume the position there.

And then on the right here, I would like to welcome Ambassador Pierre Prosper, who is currently of counsel at Arent Fox, but previously served in a number of positions in public life as a prosecutor for the United States, a prosecutor at the Rwanda Tribunal, and as the ambassador for war crimes issues in the Bush Administration. He has also been an advisor to the Romney campaign and will be representing that perspective here. And I am going to play Gwen Eifel in the middle.

Our format is going to be relatively informal, debate style. I am going to pose some questions to each of the two representatives, hopefully try to find the fault lines, and spark a little debate between them. After we have three or four questions and discussion of those among us, we will open it up to the floor and welcome your questions as well. And I understand, timekeepers, that we are allowed to go a little bit over, so indulge us. We were only allotted 30 minutes, and we have lots to talk about.

Let me start with a general framing question about the candidates' approach to presidential power and foreign policy, and I will start with you, Bill. We have had a discussion today—and this has been a critique that we heard elsewhere, too—that in terms of exerting the presidential authority in foreign affairs, many have

characterized the Obama Administration as representing more similarities to the prior Bush Administration than differences. Do you think that that's a fair and accurate characterization, and would you expect to see any difference in a second Obama Administration? Are we going to have a little bit more flexing of muscles when you don't face re-election, or will the president be the ultimate lame duck?

PROF. BURKE-WHITE: So thanks for the question, and four years ago it was great fun, right? We were on all these policy teams, you know, dreaming up policy for then Senator and candidate Obama.

Now, as Pierre and I were just remarking, I am constrained because I am in a sense representing administration policy because that is, in fact, the president's campaign platform, which does sort of narrow how one can respond on some of these issues. I would also say that four years ago I was perhaps more of a naive academic, who could tell you all of the reasons that presidential power was too inflated and was a dangerous thing. And then I got to government and quickly said that, well, where is that presidential power that we thought the Bush Administration had and realized that there is an awful lot more constraint than, as perhaps academics, we had once argued. So that, again, kind of constrains me.

Jack Goldsmith this morning, I think, answered that question better than perhaps I possibly could, but let me try to focus on the question of what we might see differently going forward, and I think the things that will drive possible differences are less internal, less, you know, policy shifts than they are external.

And I would point to three specific things that might lead to changes in how the president approaches presidential authority in foreign policy making. The first is the fact that we have enormous gridlock on Capitol Hill, and that makes it much more difficult than it was—I don't want to say in the past four years because I think there has been some continuity—but certainly looking further back in terms of ways one can work with Congress.¹ And I think the president, as he said last night, is eager to work with Congress,² but it is awfully hard to do so. That means when choices like Libya come along the thought of going to the Hill is a real, difficult, binding constraint if one takes the approach that that's necessary. So partisan politics and where that goes, I think, will, to some degree, frame the president's approach.

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1. See, e.g., *Desperate for Civility*, Editorial, N.Y. TIMES, Nov. 5, 2012, at A26 (discussing the "poisonous political atmosphere" in Congress).
 2. President Barack Obama, Remarks by the President at a Campaign Event, St. Petersburg College (Sept. 8, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/09/08/remarks-president-campaign-event-seminole-fl>.

Second is technology, and this is something we have heard a lot about today, but the changes in technology, whether it is in terms of surveillance or drones, all shift the kind of frameworks of thought about where those presidential authorities lie and where Congress needs to be involved. That means that some of the existing legislation is probably outdated, and that's not to say that we need to, therefore, ignore it, but how we collectively respond to those technology changes may shape that response.

And finally is external events. That's not to say that the president will completely shape his view based on those events, but 9/11 was a fundamental shift, and to the degree that we see changes in the external environment, that may also shape to some degree what occurs in the next four years.

I think ultimately this is a president who has and will continue to talk about limits on the executive, but I think that Jack was very much right this morning to say there are elements of continuity not with the Bush Administration of 2004 but certainly with the Bush Administration of 2008. So I will stop there and turn it over.

MS. ANDERSEN: Okay. Pierre, I will turn to you and ask you to look into your crystal ball and tell us what President Romney would do in terms of his general approach.

AMB. PROSPER: Well, thank you.

First, it is a pleasure for me to be here, and as Betsy said, I do work with the Romney campaign. But here today I am speaking as an observer and in my personal capacity.

You know, I agree—I am going to start off by agreeing, you know, with Bill, who I have known for a long time and is a friend—regarding the factors that will influence a president, the next president's decision on how to use power. But what I want to do is rather than getting into some of the legal points, I want to give you a little bit of the mindset of the Governor, which will help you understand a bit how he may choose to exercise this power. And the way to do it a little bit is also to contrast with President Obama.

Now, you hear the Governor say a lot he wants America to lead, and we hear a lot about this, you know, leadership.³ The United States should be out there leading. And I was thinking about it on the way here, how do you define leadership? Does it mean we

3. See, e.g., Philip Rucker, *Mitt Romney Talks About Afghanistan, Sept. 11 Attacks at Reno Event*, WASH. POST (Sept. 11, 2012), http://www.washingtonpost.com/politics/mitt-romney-talks-about-afghanistan-sept-11-attacks-at-reno-event/2012/09/11/1f6a2564-fc44-11e1-b153-218509a954e1_story.html (“America must lead the free world, and the free world must lead the entire world In our dealings with other nations, we must demonstrate confidence in our cause, clarity in our purpose and resolve in the application of our military might.”).

need to be out there at the point end of the stick, if you will, on military engagements, or what else does it mean? And where the governor is coming from—and you see it in his book *No Apologies*⁴—is that he is looking for America to set the tone. He is looking for America to set the agenda. It is not that we need to be out in front from the military perspective, but we need to guide the way. I know my predecessor, Ambassador [David] Scheffer, I know can speak to this, but oftentimes when we travel around the world, nations want to know where does the United States stand? What is the United States' position on something?

Now, they may not agree, but it gives them the ability to then react. And now the criticism that the governor has of President Obama is that that leadership, as I have just described, is lacking.⁵ It is almost a preference not to use some of the presidential powers and authorities that he has externally to really shape the policy, shape the agenda of the world.

Now, the other thing the governor believes in, you hear a lot about, obviously, he wants to increase the Navy and the military, but he does talk a lot about soft power and the rule of law, and again, I recommend you look at that chapter in his book because he believes that soft power is critical.⁶ In order for soft power to be effective, you need hard power. They go hand in hand, so when you have hard power, soft power is credible and vice versa. So he wants to get out there, promote the rule of law for the obvious reasons that we know but also for economic reasons to build a better environment for America, businesses, and Americans as they travel.

Now, that's not, you know, deep into some of the legal weeds that you all have been getting into today, but it gives you a sense of the mindset and where things may go.

MS. ANDERSON: Okay, great. Let me follow up then with you Pierre. We have talked a fair amount this morning about presidential powers and the balance of powers between the president and Congress with respect to war powers. And there was a fair amount of critical discussion about the Obama Administration—its stretching of the AUMF⁷ to exert power in the post-9/11 period, and also its failure to go back to Congress to get authorization under the War Powers

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4. MITT ROMNEY, *NO APOLOGIES: THE CASE FOR AMERICAN GREATNESS* (2010).
 5. *See, e.g., Mitt Romney Criticizes Obama's Leadership*, WASH. POST (Jan. 6, 2012), http://www.washingtonpost.com/politics/mitt-romney-criticizes-obamas-leadership/2012/01/06/gIQA7N7xeP_video.html.
 6. *See* ROMNEY, *supra* note 4, at 74–100.
 7. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

Resolution for its operations in Libya.⁸ There was also a fair amount of discussion that that was maybe, again, more continuity than change in recent years.

But what can we expect from the Romney Administration in terms of that division of labor between Congress and the presidency? Perhaps President Romney would have a more welcome reception in Congress, and would that make a difference in the approach?

AMB. PROSPER: Well, you know, it may. And I think the key here is the engagement with Congress, and I think you can expect to see Governor Romney engage on these issues.

Now, whether he would be successful depends on the makeup of the Congress and how the relationships form, but I think you can expect to see this because he does believe in building that type of consensus to go forward or driving the consensus to go forward. However, that said, I think that every president, every candidate that became president recognizes that once you are in office you begin to look at some of the legal tools available to you, and there is natural or inherent tension or sometimes disagreement with the Congress.

So that's not to say that he would not decide if he believes he is on solid legal footing to go in a particular direction, but his goal is to try to unite us into a common direction so that, again, it makes America more stronger and more prosperous.

MS. ANDERSEN: Okay. And, Bill, what about the Obama Administration? Do we have an AUMF 2.0 coming if the president is re-elected?

PROF. BURKE-WHITE: Let me talk about Libya first, which is to say, obviously, I will cite you to Harold Koh's excellent testimony on this question if you are asking about a question of what the administration policy is on it.⁹ But fundamentally, I was in government when we were making the decisions about how we were going to respond in Libya. And I watched the United States move about 180 degrees in policy in about one week's time, and that was driven by a perception of an urgency to respond to a situation on the ground.

And this is a president who, when he sees a situation where he believes America's interests and values are imperiled, will say what is the right set of tools available to us to solve that? He did so in a way that he believed was fully in keeping with the War Powers Resolution and in a limited and constrained way that both saved lots of lives on

8. Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 15, 2011, at A16.

9. *See generally Libya and War Powers: Hearing Before the S. Comm. On Foreign Rel.*, 112th Cong. (2011) (testimony of Harold Hongju Koh, Legal Adviser, U.S. Dep't of State).

the ground in Libya and protected America's interests in the region. I think that's how the President is going to address those questions going forward. This is not someone who wants to intervene, and we have seen with our hesitancy to move into Syria in a military sense, that he is not going to immediately look toward a military solution, but he is one who is going to be willing to do so even when he realizes there are domestic political costs of doing that. And I think he realized that the costs to try to get a congressional resolution on this were sufficiently great that it made sense to have a more limited U.S. engagement that still achieved our objectives, and I think this is a president who is really willing to take those bold decisions when they are needed, even if there are political costs there.

Will we look to a different approach going forward? Frankly, I think we have to because technology is going to make the way these kinds of lower-level, more limited conflicts get dealt with very differently, right?¹⁰ If one is thinking about the use of the internet or the use of drones in ways that don't imperil American lives directly, that may take one outside of the scope of the War Powers Resolution. And, therefore, we may need a different approach going forward; one that I hope also can be built on a bipartisan consensus, but one where I am not seeing that consensus emerge.

AMB. PROSPER: Betsy, if I could just jump in, this is more of a question to Bill, stimulate a little debate, you know. I hear you about Libya, but I am puzzled about Syria. I really am because when you look at the President's speech for Libya, he—and I am paraphrasing—he says, you know, “I cannot sit idly by and watch atrocities and massacres take place before my eyes. I need to do something.”¹¹ And then when you look at Syria, the numbers are over 20,000 people killed in 18 months,¹² and the President is doing just that. He is sitting there just idly by, watching, and his response is, “Well, let me issue more sanctions. Maybe that will do it.” Now, I am not advocating military action, but one would guess there are other presidential tools and powers available to him where we could stop

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10. See generally Darren M. Stewart, *New Technology and the Law of Armed Conflict*, 87 INT'L L. STUD. 271 (2011) (discussing the development of military technology and the potential shift in how armed conflict is fought).
 11. See President Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011), available at [#transcript](http://www.whitehouse.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya).
 12. Anne Barnard & Rick Gladstone, *Iran and Turkey Join Syria Peace Envoy in Call for Truce*, N.Y. TIMES (Oct. 17, 2012), http://www.nytimes.com/2012/10/18/world/middleeast/iran-and-turkey-join-syria-peace-envoy-in-truce-call.html?_r=1&.

picking up the paper every day and hear that 500 people were massacred.

Your thoughts on that?

PROF. BURKE-WHITE: So I think with any of these kinds of conflicts one has to balance a couple of things, right? One is, what is America's interest in the conflict or in the region, and sometimes that's about American values and that's something President Obama believes in just as strongly, if not stronger, than Governor Romney, which is where you started, but at times, those are going to be balanced against the risks to other American interests to American lives on the ground if you had to have a military action on the ground and certainly to our broader interests in the region.

I can't say exactly what other powers might have been used in Syria. I can say a little bit about Libya because it is more—that is sort of out in the open now, but we sat at the State Department and worked very hard across the agencies to figure out not just how do we put sanctions on Qaddafi's regime,¹³ but how do we get financing to the rebels that makes sense, but how do we also make sure that rebels don't gain access to weapons that might eventually be used against us? So there is a set of balancing there that makes it very hard to proclaim a simple principle. I do know that President Obama is not simply standing by saying, "I wish we could do things." There are some things that I think we are doing. I personally would love to see us do more, but again, that's about balancing those sets of interests, and I think any U.S. president is going to have to make those kinds of balancing calls.

MS. ANDERSEN: If I can jump in, it seems pretty clear that one constraint on action in Syria is in the Security Council and opposition on the part of China and Russia to Security Council action¹⁴ and that the Obama Administration has taken that as kind of a hard stop on what they can do. Would a Romney Administration similarly look for Security Council authorization before acting in such a situation?

AMB. PROSPER: Well, I think you would see a Romney Administration address or go to the Security Council but not be bogged down by indecision in the Security Council, and I think there comes a point in time in finding—I think this administration after eighteen months realized that the Security Council wasn't working and is beginning to look at things outside of the Security Council

13. See Helene Cooper & Mark Landler, *U.S. Imposes Sanctions on Libya in Wake of Crackdown*, N.Y. TIMES, Feb. 26, 2011, at A1.

14. See Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES, July 20, 2012, at A8.

process.¹⁵ I think you would see some actions like that much sooner in a Romney-type of administration, and I think you would see action as we saw in Kosovo, whatever it may be, when you realize we are not getting any play in the Security Council. Let's see if we can get the folks in the region together to take action.

PROF. BURKE-WHITE: No disagreement there essentially. I think we have gone to the Security Council on Libya and were extraordinarily effective on getting 1973¹⁶ through, and that the approach there was very much to bring together the region, go to the Gulfco Operation Council,¹⁷ go to the African Union and get the support in the region that then you can use in the Security Council to move the agenda there.¹⁸

Syria is harder because, frankly, Russia and China are deeply opposed, and there you have a much greater question of: Do you violate or truly step beyond the Council, or do you try to use it? And do you try to look for other ways where you don't need a Security Council resolution? And I think that has been the Obama Administration's approach, and I think that's where the Security Council is blocked, to look for alternative mechanisms that don't require identifying the Council itself.

MS. ANDERSEN: Okay. I am going to switch to a new topic where I think there is probably even greater difference between the candidates, and that is Guantanamo detentions.

Bill, President Obama made a point on his first day in office of issuing an executive order closing Guantanamo.¹⁹ We heard discussed earlier today how that has proven somewhat more difficult than was anticipated, mostly due to opposition of Congress.²⁰ But what has the administration learned from that experience? And would we see a push forward or some new strategy to close Guantanamo in a second administration?

15. See Louis Charbonneau & Michelle Nichols, *U.S. Hints at Bypassing U.N. on Syria*, REUTERS (May 30, 2012), <http://www.reuters.com/article/2012/05/30/us-syria-un-idUSBRE84S1AT20120530>.

16. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

17. See Karen DeYoung, *Clinton Meets with Gulf Nations over Missile Defense*, WASH. POST, Mar. 31 2012, at A8.

18. See Hillary Rodham Clinton, Sec'y of State, Remarks with African Union Commission Chairperson Jean Ping (Apr. 21, 2011), *available at* <http://www.state.gov/secretary/rm/2011/04/161480.htm>.

19. Exec. Order No. 13,567, 76 Fed. Reg. 13,275 (Mar. 10, 2011).

20. See Peter Finn & Anne E. Kornblut, *How the White House Lost on Guantanamo*, WASH. POST, Apr. 24, 2011, at A13.

PROF. BURKE-WHITE: So the first thing I would say is, while the President did come in with a goal of closing Guantanamo Bay, the Administration has actually, I think, done a rather remarkable job of decreasing the number of people in Guantanamo Bay, releasing those who could be released, finding other countries willing to take them such that the numbers have significantly diminished.²¹

And I think we all underestimated the challenge of making those determinations and finding countries willing to accept Guantanamo detainees, but through a lot of hard work and a lot of diplomatic effort, significant strides have been made. I don't think those strides have gone far enough, and I think it will continue to be a goal to figure out what to do with the remaining 160 or so people who are in Guantanamo Bay.

Some of them will be tried now, obviously, under military courts in Guantanamo Bay. It is unfortunate that the option of trying them under US domestic law, which has proved very effective, but for a whole range of terrorist cases, is not on the table because of congressional legislation.²²

I don't think you will hear President Obama make any grand commitments for a date for closure of Guantanamo Bay, but I think there will be an ongoing process to try to reduce the numbers of people there in ways that fully conform with the Constitution, with due process, and with international law, and I think you have seen some significant reforms and changes in those processes to do that.

I also think—and this came up earlier today as well—that you are seeing shifts in how one deals with the decisions to: do you apprehend people, when do you apprehend, and what do you do with them so that, hopefully, we don't find ourselves in a position where Guantanamo Bay starts to grow again, and I think we have been quite successful at that. That doesn't mean necessarily using targeted killings, but it does mean asking, you know, when is there a reason to detain someone rather than simply detain them and then ask later.

MS. ANDERSEN: Okay. Pierre, let's hear about Governor Romney's perspective. He has certainly been a staunch supporter of U.S. detention at Guantanamo Bay and during the 2008 campaign was on record as saying he thought the detention there should be doubled.

21. At the start of the Obama Administration, there were 242 detainees at Guantanamo, and as of October 3, 2012, there are 166 detainees being held at Guantanamo with 87 of those detainees already approved for release. See *Guantánamo by the Numbers*, HUMAN RIGHTS FIRST (Oct. 3, 2012), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Gitmo-Numbers.pdf>.

22. See Jeremy Pelofsky, *House Bars Moving Guantanamo Detainees to U.S. Soil*, REUTERS (Dec. 8, 2010), <http://www.reuters.com/article/2010/12/09/us-guantanamo-prosecutions-idUSTRE6B75M020101209>.

What would be his approach to Guantanamo specifically and detention of future suspects in efforts to combat terrorism?

AMB. PROSPER: Well, I think, first, we need to face reality. The reality is, there will be detentions, either by President Obama or President Romney. In fact, I am sure, if we scratch the surface a little bit, we would realize that the United States government is involved in detention policies, detention issues around the world.²³ It may not be Guantanamo. Guantanamo became a cause célèbre. It became very visible, but I can say with some assurance or comfort that I am sure there is detention still taking place in various parts of the world.

Now, recognizing there will be detention, the idea is, okay, if we are going to have these detentions, let's have a facility where you can do so, and that was the idea behind what Governor Romney has been saying.

But what I find interesting with President Obama, I don't think you hear him saying anything on Guantanamo because ever since his first day in office when he realized he wasn't going to close it, he stopped talking about it. Now, if you think about—and Bill, yes, the administration has been able to diminish the population slightly but not greatly. When I was in the Bush Administration, the population rose to about 750.²⁴ We were able to get out 500 detainees, 500 of those, and you know how that happened? And none of them came to the United States.²⁵

What it was, it was hardcore diplomacy where the president, the national security adviser, secretary of state, myself would get out there. Every time a foreign leader who had a national in Guantanamo came, we would sit them down and say, "We want to send this person back. You know, what will it take? Let's work out an arrangement." You are not seeing that from this president. This president decided what he wants to do; he is not going to do the heavy lifting. He defers to the bureaucracy with hopes they will find a solution, either a willing nation or somewhere in North Africa, or try to bring them into the United States. I don't expect to hear him talk about that.

The other thing—and I won't add a comment to this—but what the president is doing is—and I am going to contradict myself by saying we are involved in some detention policies—what he is doing is, he is not detaining them; he is killing them. And let's be honest with these drone attacks. These are the type of people who would have been detained before. So instead these drones are going and they

23. See, e.g., *Bagram Detention Center (Afghanistan)*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/b/bagram_air_base_afghanistan/index.html (last updated Nov. 19, 2012).

24. Jackie Northam, *Q&A About Guantanamo Bay and the Detainees*, NPR (June 23, 2005), <http://m.npr.org/story/4715916>.

25. *Guantanamo by the Numbers*, *supra* note 21.

are identifying terrorists, using the same intelligence that has been used for detained people in Guantanamo, and instead of bringing them and having the opportunity to either interrogate and collect intelligence or find out you were wrong, they are being killed.

So, I am not sure what will happen in the Obama Administration. I think the Romney Administration would recognize that there is a need for some sort of detention policy and that would be flushed out.

MS. ANDERSEN: I was going to follow up and ask: Do you anticipate that a Romney Administration would shift the calculus between detention and drones, at least, from what we currently have?

AMB. PROSPER: Well, I haven't talked to the Governor directly about this, but I think that when you look at these type of issues, you need to recognize, obviously, the threat that these individuals pose, but you also should recognize the value that is derived in having a detention policy where you can collect credible intelligence that will help you decipher what may or may not be happening. And it also affords you the opportunity to correct your mistake if you are wrong. So I think all these things will be examined.

MS. ANDERSEN: Bill, follow up?

PROF. BURKE-WHITE: So I have to disagree with you on one point. The question of, you know, does President Obama sit by and let the bureaucracy work out how to get people out of Guantanamo Bay? Maybe the secretary is the bureaucracy, but I have sat in on a number of meetings with Secretary Clinton and heads of state in which she did exactly the kind of hard diplomacy you are talking about.

The problem is largely that the people who are left in Guantanamo are either from countries where you cannot repatriate them, say, Yemen,²⁶ or at least, it is very difficult to repatriate them, or where there is a real risk of release,²⁷ and that's the question of, then, what do you do with them, right?

So, I think both clearly Governor Romney and President Obama are willing to use a hard push, as was the Bush Administration, to get that done. But Secretary Clinton, I have watched do it absolutely brilliantly, so on a personal level, I have to respond on that question.

And I do think in terms of the question of the balance between detention and the use of targeted killing, there have been and I think will continue to be shifts in the Obama Administration approach

26. See GUANTANAMO REVIEW TASK FORCE, DEP'T OF JUST. ET AL., FINAL REPORT ii (Jan. 22, 2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

27. See *id.*

based on the kinds of intelligence you have and the circumstances, and also where the individuals are.

Sometimes detention may be the right option, but then we have to make sure it is done in a way that fully accords with due process as President Obama has indicated, and sometimes when you are in a battlefield situation, a drone attack may be the right option to pursue, and I think either candidate is going to engage in a balancing there to make those determinations.

MS. ANDERSEN: Okay. I am going to ask one last quick question and then open it up to the floor. Shifting gears again, back to our last panel—and I have to agree with Melissa Waters—I think *Avena*²⁸ is a fascinating case, and I couldn't resist coming back to it here. Now, I will put this one first to Pierre.

We know the *Medellín*²⁹ situation, and we had a lot of discussion about the implications for self-executing treaties in the last panel. What I would like to come back to is: What do we do with the *Avena* judgment now? We are still in non-compliance. Everyone agrees this is an obligation of the United States government.

The Bush Administration agreed.³⁰ The Supreme Court agreed. The Obama Administration has agreed to this but has not been able to do anything about it.³¹ What would a Romney Administration do to bring us into compliance with the *Avena* judgment?

AMB. PROSPER: Well, here, too, the specific issue, I have not had a conversation with the Governor, but what I would expect is that if presented with this issue—and so we need to meet our obligations—I think he would basically follow what the Supreme Court said and engage Congress and try to push this through to make it happen.

The last panel was very fascinating for me, to hear all the varying views, and as I think about it, I think about what Melissa was saying. I personally like the dualistic type of approach because I think it is important to engage our Congress and descend on these issues.

You know, they need to understand that when they ratify a treaty, what the obligations are that accompany that treaty and assure the appropriate legislation is in place to make it happen, because we just don't want to have a rubber stamping of a treaty and then find ourselves in a situation where we are in conflict.

28. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

29. *Medellín v. Texas*, 552 U.S. 491 (2008).

30. *See id.* at 498.

31. *See Obama and U.N. Seek Delay in Execution of Mexican National*, CNN (Jul. 1, 2011), <http://www.cnn.com/2011/CRIME/07/01/texas.death.row.inmate/index.html>.

In fact, one of the biggest problems that we see internationally on these treaties—and David Scheffer spoke about this with the ICC—it is something that we have talked about, the United States generally, when we sign and ratify a treaty, we only do so when we know we are going to be able to fulfill the obligations. If we think we can't, then we don't sign or ratify. There are plenty of countries out there that will do it, they will sign and ratify it so they can say, "Oh, we have all these international instruments that we are a party to. Aren't we a great nation?"

So what I think you will see is an analytical approach of these things. You look at it and say, "Well, you know, we are a party. We signed these various treaties," whatever it may be. If there is a role for Congress that needs to, they need to act upon it so we can meet our obligations, I would expect that he would push hard for congressional action.

MS. ANDERSEN: And, Bill, the Obama Administration hasn't been able to do that on Capitol Hill. It has had some other priorities. Would it be a priority in the second administration?

PROF. BURKE-WHITE: I think it would be a priority, probably not the number one priority in the international legal space. President Obama is someone who is deeply committed to international law. It is something he thinks about, knows about, and always has a voice at the table for. He is also a president who says, "How can international law best serve American interests?" And the answer to that might be—and I think if you look at what we have done in the international legal space over the past few years—may well be to say, "Let's do everything we can to make sure that the START Treaty³² gets ratified with Russia because that protects American interests. Let's try to get the Senate to ratify the Convention on the Law of the Sea³³ because that will serve American interests. Let's try to get the Disability Convention³⁴ through because that will help American citizens."

The question with the *Avena* judgment is, where does it sit in that kind of political hierarchy of what do you go to Congress and push for, and I think it is on the list, but I think what you will continue to see is the president will say one of the things that we need to get through Congress that most directly serve the interests of the United States. And over the past few years, it has been things like

32. Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, Apr. 8, 2010, S. TREATY DOC. NO. 111-5.

33. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

34. United Nations Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

Stark and like the Law of the Sea where the president has said, “That’s really got to be my number one priority when I go push an international legal issue on the Hill.”

I do think that, based on *Avena* and *Medellín*, every time we go to the Hill with a treaty, we are thinking even more explicitly about making sure the implementing legislation that perhaps once upon a time didn’t think was necessary is there in making sure that’s part of the package. Unfortunately, with the House where it is, sometimes that can be a lot harder than we might like it to be.

AMB. PROSPER: Let me just jump in for a second. I am no expert on this so what I could say right now could be completely wrong. But when you are looking at the prioritization of this, I don’t know if I would put it up to the level of passing a treaty because what we are talking about is passing legislation. What we are asking for is for the law enforcement that when you get a request, similar to a *Miranda*, you have to, you know, allow this person to make that phone call.³⁵ So that should be an easy piece of legislation to pass through.

The other aspect of it is it may not necessarily need to be congressional action. Couldn’t the president get out there, lead the Justice Department to send an advisory opinion to all the states and try to get them to implement it into state legislation so that a police officer knows that this is what needs to occur?

PROF. BURKE-WHITE: President Bush tried that, and Texas didn’t listen,³⁶ and the broader question is one of how do you ensure compliance with an International Court of Justice decision in that case barring an execution?

I do think it is about figuring out ways to make sure that international legal norms percolate into our domestic system. Sometimes that’s done best through an international treaty with implementing legislation; sometimes just through legislation; sometimes through presidential action or local law enforcement action. The difficulty is, how do you ensure conformity across those things, and I think President Obama has thought about it that way but has decided this isn’t the push to make on the Hill at the moment and, hopefully, either candidate can find ways of going outside of Congress, if need be.

35. See William J. Aceves, *Consular Notification and the Death Penalty: The ICJ’s Judgment in Avena*, AMERICAN SOCIETY OF INTERNATIONAL LAW INSIGHTS (Apr. 2004), <http://www.asil.org/insigh130.cfm>.

36. See Memorandum from President George W. Bush to the Attorney General, Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html>.

MS. ANDERSEN: I am going to cut you off there and invite members of the audience to put questions to the two representatives here for a few minutes before we close up.

AUDIENCE MEMBER: Ben Davis, University of Toledo. A question I had was with regards to the international rule of internal self-determination there on the Republican side. Consistently now about twenty seven states disenfranchise people from their voting rights so they won't vote this fall.³⁷

On the Democratic side, there have been some cases that have been filed to object to the Republican side, and the Texas law passed by the Republicans was overruled.³⁸ Recently, down in Florida,³⁹ it was overruled, and efforts have been done here in Ohio, also.⁴⁰

So with regard to the right to vote of ordinary American citizens, what is the position of the Romney Administration? Are they in favor of these laws that limit the right of internal self-determination that have been passed by lots of Republicans?

And on the side of the Obama Administration with regards to not prosecuting people for torture, what are you going to do in the next four years? Is that going to sort of end now because we know high-level civilians prosecuted—high-level civilians did the torture, ordered right up to the president of the United States? Are we above the law, too?

MS. ANDERSEN: I am going to actually pool all the questions and then let you have at it.

AUDIENCE MEMBER: I just have what I hope is a very simple question. Really the same question for both sides: You know, there is much ballyhoo of reset with the Russians, and we have now seen some of the fruits of that reset, maybe not as much as the Administration hoped, but of course, in Syria, we have seen that is not going to bear fruit. So my question for Bill would be, what comes of that? You know, do you just continue trying to get your head into the reset wall, or what do you do?

And with respect to Pierre, clearly, under the new administration, there will be a need to reengage in some places and then reset. Where would you see as a key priority, based on what's happened this term,

37. See generally *Voter Identification Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislature-res-elections/elections/voter-id.aspx> (last updated Jan. 14, 2013).

38. See Ari Berman, *Courts Block GOP Voter Suppression Laws*, THE NATION (Oct. 2, 2012, 11:33 AM), <http://www.thenation.com/blog/170287/courts-block-gop-voter-suppression-laws#>.

39. *Id.*

40. *Id.*

to saying, “Oh, we are weak in this area, and we need to reengage in a more forceful way that shows leadership?”

MS. ANDERSEN: Okay. Next?

AUDIENCE MEMBER: John Quigley, Ohio State University. Does either the governor or the president consider the Israeli settlements in the West Bank are in violation of international law, and will they continue to provide aid to Israel if the settlements aren't maintained?

And does either agree with the view expressed by General Petraeus that our policy on Israel is the underlying cause of the terrorist acts against the United States?⁴¹

MS. ANDERSEN: Okay. I am writing these down, and I will recap them.

AUDIENCE MEMBER: Okay. Does either candidate have any plans on ending the war soon? And if so, what are their plans to end the war so that American citizens can again have a peace-time economy and again have prosperity?

MS. ANDERSEN: And just a point of clarification: You mean just Afghanistan or a broader context?

AUDIENCE MEMBER: Everywhere. Can we just be a peaceful nation again? And I am asking that question of both candidates.

MS. ANDERSEN: Okay. So we have got voting rights, accountability for torture, reset with the Russians and what you get or do with that, Israeli settlements, aid to Israel, views on Petraeus's statement about support of Israel, and ending the war.

PROF. BURKE-WHITE: Who wants to go first?

AMB. PROSPER: Sure, I will go first.

Where is our—the guy left, the voter ID.

MS. ANDERSEN: No. Right there in the middle.

AMB. PROSPER: Oh, there he is. Well, thank you for your question. First of all, I am not an expert on the laws that are being passed or pushed through in many of these states, but the principle behind it, and you are saying it is disenfranchise, but the idea is really more for a voter ID process, meaning identification when you come to vote. That's the basic of what these laws are supposed to be about. Do you

41. See *The Posture of U.S. Central Command: Hearing Before the S. Armed Servs. Comm.*, 111th Cong. 12 (2010) (statement of Gen. David Petraeus, US Army) (“The [Israeli-Palestinian] conflict foments anti-American sentiment, due to a perception of U.S. favoritism for Israel Meanwhile, al-Qaeda and other militant groups exploit that anger to mobilize support.”).

have an identification so that we can properly tie the right to vote with the person before you? Otherwise, if the people come there without identification, there is room for fraud.

Now, you may have examples of people being disenfranchised, and I am not in a position to challenge that, but the notion that you require an identification for a voter should not be one that is troubling.

Now, Michael Newton's question about Russia reset, where are we going to reengage, I think you will see a reengagement or different type of engagement across the world. I mean, Russia is a primary issue. Russia is obviously—and if you look at internally what they are doing—they are trampling on democracy and human rights.

You see what they are doing to their neighbors, Georgia and others, using energy as a weapon, invading Georgia and the list goes on. We have to have a deeper and better engagement with China.

And the Secretary, you know, I applaud her, but she had a very, very difficult visit this week in China. It was, basically, she was reprimanded by the Chinese media and the vice president who refused to meet with her.⁴²

Regarding Israel, you will find, you know, Governor Romney, and he said this, he will be in full support of Israel, and an issue with the settlements deals with the issue of the borders and where you draw the line on the borders, but as I said, he is a staunch supporter of Israel.

And I think you have to look at that, but also the states in the region have to accept their role and responsibility. I mean, you can't have Akan Diajar sit there and say, "We have to annihilate and kill the Jews."⁴³ You know, you just can't have that. That has nothing to do with the U.S. policy. That's Iran making these statements.

Lastly, peace, yes, I think the United States can be a peaceful nation and should be a peaceful nation, and what the governor wants to do, what he believes is peace through strength. He wants to build enough of the hard power so that the soft power becomes effective, so we don't have to engage in these conflicts, and we can return to the peaceful economy.

MS. ANDERSEN: Okay. Last word is for Bill.

PROF. BURKE-WHITE: That's a lot of topics. I can't do them all, but let me start by saying in his National Security Strategy in 2010,

42. See Steven Jiang, *Absence of Chinese Vice President Fuels Intrigue Before Power Transition*, CNN (Sept. 12, 2012), <http://www.cnn.com/2012/09/11/world/asia/china-vice-president/index.html>.

43. *Iran: We Will Help 'Cut Out the Cancer of Israel'*, THE TELEGRAPH (U.K.) (Feb. 3, 2012), <http://www.telegraph.co.uk/news/worldnews/middleeast/iran/9059179/Iran-We-will-help-cut-out-the-cancer-of-Israel.html>.

President Obama laid out a vision of leadership, and it was a vision of global leadership that starts here at home.⁴⁴ It starts by rebuilding America's economy and jobs and allowing us to be in a place to lead globally.

We want to do that sort of leadership partly through stepping away from the military where you can but also being strong where you need to be. That also means doing it smartly. It doesn't mean that you choose to go to war when there is not an American interest at stake or American values at stake, but it does mean that you position military forces where you need them to stay strong. And that's why President Obama has shifted some of our emphasis from the Middle East to the Asia Pacific so that we have more leverage with countries like China where I think a lot of that focus is going to have to be.

So it is not about saying we can't just withdraw from the world because if we do, we are at risk around the world. We have to be engaged with the world very strategically and only use military force when we need to.

In terms of the Russian reset, Michael McFaul, who was then the Senior Director at the National Security Council on Russia policy, and now our ambassador there, I think was brilliant to reset that relationship.⁴⁵ It was at an all-time low when President Obama came into office.

The problem with a reset is binary. You flip the switch, and you are done with the reset. So it is not a good linguistic hook for sort of a longer term building of that relationship. I think we need to be asking ourselves with the Russians what is the basis of that relationship going forward? What role does Russia see itself playing in Europe and in the world? And we want to make sure that role isn't one of using energy as a threat or invading neighbors or putting rock bands in jail because they criticize the Russian government.

At the same time, Russia is a critical partner. It is a critical partner on Syria; it is a critical partner on trade; it is a critical partner with China, and so it is about finding the roots of that. And part of that means we need to do some things with the Russians so they will do some things for us, and we need to be able to say no to our friends, the Russians, when they do things like they have lately.

So I think we need to kind of continue that and make it a process of reset where we also derive some benefit going forward. I see the stop time, but I can't let the Israel question just hang there, which is to say President Obama, I think in his second term, will move the Israeli-Palestinian peace process front and center. It is something he

44. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 2-3 (2010).

45. See Ellen Barry, *Frosty Relations with Russia Begin to Thaw After Obama's Re-election*, N.Y. TIMES, Nov. 14, 2012, at A6.

cares deeply about, and I think it is something he will be extraordinarily well-positioned to do in his second term.

That means being a good friend to Israel, who are our friends and have long been allies. It also sometimes the best thing you can do for a friend is to say, “Actually, that’s not such a smart idea,” or “Actually, that’s illegal.” That doesn’t necessarily mean they will always listen, but friendship is about helping us all find a course that can lead to ultimate stability and peace in the region, and I think that’s what President Obama wants to do across the Middle East as the Arab Spring hopefully forward, so I will stop there.

AMB. PROSPER: What has the reset gotten us? You say we have to do things for Russia to get things in return. What have they given us? I mean, what can we point to? They are fighting us with Iran.⁴⁶ They are fighting us with Syria.⁴⁷

PROF. BURKE-WHITE: Vote on 1973 and a whole lot of help on Iran.

MS. ANDERSEN: We are going to move the debate to the reception. Please join me in thanking our speakers.

46. See Steve Gutterman, *Russia Warns Against Attacking Iran Over Nuclear Fears*, REUTERS (Sept. 6, 2012), <http://www.reuters.com/article/2012/09/06/us-nuclear-iran-russia-idUSBRE88507K20120906>.

47. See Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES, July 20, 2012, at A8.