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War Without End? Legal Wrangling Without End

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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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WAR WITHOUT END?
LEGAL WRANGLING WITHOUT END

Jeremy Rabkin

WAR WITHOUT END? LEGAL WRANGLING WITHOUT END

*Jeremy Rabkin**

It is optimistic to argue, as Jack Goldsmith does, that debates in the Bush era generated a broad consensus on national security law in later years. Rather, partisan critics denounced a Republican administration for violating the law, then acquiesced to similar practices when implemented under its Democratic successors. But politics won't disappear from national security law, because citizens demand security as well as law. Political leaders will only embrace fixed rules when they accommodate exceptions. We will continue to have debates over the exceptions. Even the original expounders of modern natural law expected this result.

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Jack Goldsmith's book, *Power and Constraint*,¹ is a genuine contribution to the history of our time. It offers a wealth of detail, reflecting energetic and fair-minded inquiry. I believe its underlying interpretation of events, however, is somewhat optimistic.

In Goldsmith's account, the debates of the Bush years achieved reform of some policies. For other policies, such debates established a more firmly grounded consensus, ultimately embraced by the Obama Administration. In Goldsmith's view, this shows that we have a system that will restrain impulsive presidential action. I accept every detail of Goldsmith's account, but I remain skeptical of his "relatively sanguine" conclusion.²

I don't say this as someone determined to counter the positions advanced by Professor Goldsmith. A few years ago, Goldsmith published (with Darryl Levinson) *Law for States*, in the *Harvard Law*

* George Mason University School of Law.

1. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).

2. *Id.* at 248.

Review,³ expressing general skepticism about such law, noting parallel difficulties in international law and American constitutional law. I think the skeptical Goldsmith of that article offers a better perspective on recent disputes about national security law than the optimistic account on offer in *Power and Constraint*.

I. QUESTIONABLE CONSENSUS

As Goldsmith tells the story in his book, we had fierce debates about Guantanamo detention policies, about trial by military commissions, and about coercive interrogation practices in President George W. Bush's first term. Reforms were introduced into detention policy and into military trial procedures; a blanket ban was imposed on "torture." The most sensible or consensual compromises of the Bush era prevailed after they were "vetted, altered and blessed—with restrictions and accountability strings attached—by other branches of the U.S. government."⁴ In short, the system worked.

I see the larger pattern differently. I am struck not by continuity but contrast. Partisan critics of the Bush Administration wielded legalist critiques when it was helpful in discrediting Bush policies. They then forgot their scruples when the White House was occupied by a president who was more to their liking (at least in general). That left the Obama Administration free to disregard legal constraints on the executive and to disregard even the policy compromises supposedly settled by the previous debates.

Start with the issue of detention. The Obama Administration came to office promising to close the detention facilities at Guantanamo. It is true (as Goldsmith records) that congressional opposition forced the new administration to abandon plans to move Guantanamo detainees to U.S. prisons and arrange for civilian trials of detainees in the United States.⁵ But the Obama Administration was not willing to develop a new policy to determine when newly captured terror suspects could be brought to Guantanamo. Perhaps it was unwilling to offend the political constituency that still expected Obama to close down Guantanamo and so did not want to be seen expanding rather than diminishing the number of detainees there. It did not embrace Goldsmith's confident conclusion that Guantanamo—now that "torture" had been outlawed and some form of habeas jurisdiction extended there—had been "vetted" and "blessed" as a suitable place to bring suspects for long-term detention and continuing interrogation.

3. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

4. GOLDSMITH, *supra* note 1, at xii–xiii.

5. *Id.* at 11–12.

Instead, the Obama Administration stepped up drone strikes on terrorist suspects, as if killing terrorists were always preferable to capturing, detaining, and interrogating them.⁶ One might think targeted killings would have raised troubling legal questions. Nonetheless, the Obama Administration has received far less criticism for drone strikes than the Bush Administration did for its detention and interrogation practices.

The Obama Administration received so little criticism that it was emboldened to extend the reach of its drone campaign to seemingly peripheral targets. The most notable of these was Anwar al-Awlaki, a Muslim imam, accused of providing “motivational” videos inspiring viewers to engage in terrorism.⁷ Al-Awlaki was, in fact, a U.S. citizen, educated at American universities.⁸ He was alleged to have encouraged potential recruits to participate in terrorist operations, but his own direct role in terrorist operations remained sketchy (at least in public accounts).⁹ One might say his videos were clerical malpractice, but they probably would not be regarded as criminal offenses in the United States. Capital punishment seems a rather extreme penalty in the circumstances.

The Obama Administration assured critics that it would not undertake targeted killings except after careful review, a review conducted entirely within the executive branch, in secret, without participation by the intended target, without any opportunity for administrative appeal, let alone appeal to the ordinary courts.¹⁰ One

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6. For one of the rare acknowledgments that drone strikes would deprive the United States of valuable intelligence that might be gained by capture and interrogation, see Marisa Porges, *Dead Men Share No Secrets*, N.Y. TIMES, Sept. 24, 2012, http://www.nytimes.com/2012/09/25/opinion/dont-kill-every-terrorist.html?_r=0.
 7. Scott Shane & Souad Mekhennet, *From Condemning Terror to Teaching Jihad*, N.Y. TIMES, May 9, 2010, at A1.
 8. *Id.*
 9. See David Ignatius, *The Killing of Anwar al-Aulaqi: The White House's Drone Attack Policy*, WASH. POST, POST PARTISAN BLOG (Sept. 30, 2011, 11:56 AM), http://www.washingtonpost.com/blogs/post-partisan/post/the-killing-of-anwar-al-aulaqi-the-white-houses-drone-attack-policy/2011/09/30/gIQAT3HAAL_blog.html (citing characterizations of al-Awlaki as “chief of external operations” for an al-Qaeda group in Yemen).
 10. An overview of the administration’s procedures and legal arguments was not provided in a formal document but in a speech by Attorney General Eric Holder at Northwestern University School of Law. Eric Holder, Att’y Gen., Dep’t of Just., Speech at Northwestern University School of Law (Mar. 5, 2010), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

might think this “procedure” would raise more concerns than anything attempted at Guantanamo. In fact, it provoked very little public debate.

Meanwhile, President Obama repeatedly hailed the killing of Osama bin Laden as “justice”¹¹—entirely divorcing justice from any form of due process. There was remarkably little public debate about whether the Navy Seals who carried out the raid on bin Laden’s hiding place in Pakistan had the option of capturing rather than killing him. There was little public inquiry even regarding the instructions they had actually received from the Obama White House. Concern about international law, which happens to prohibit the denial of quarter to an enemy willing to surrender,¹² almost vanished from public debate.

It might be that public feeling against the perpetrators of the 9/11 attacks was still too heated for anyone to bother about international law in that situation. But consider a different contrast, that between the recourse to active war measures under Bush and then under Obama.

The Bush Administration received intense criticism, at least in some quarters, for launching the invasion of Iraq in 2003 without a formal authorization from the UN Security Council.¹³ The criticism grew more intense when, months after the invasion, investigators still could not discover WMDs in Iraq. That seemed to undermine the main argument which the Bush Administration had advanced for the war—that Iraq had failed to dismantle its weapons programs (or failed to satisfy international inspectors that it had done so).

Possible legal justifications are reviewed in somewhat more detail in a non-committal memo distributed (secretly) to members of Congress. See Memorandum from Jennifer K. Elsea, Leg. Att’y, to Congress on Legal Issues Related to the Lethal Targeting of U.S. Citizens Suspected of Terrorist Activities (May 4, 2012), *available at* <http://www.fas.org/sgp/crs/na/tsec/target.pdf>.

11. See, e.g., President Barack Obama, Remarks by the President on Osama Bin Laden (May 2, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/05/02/remarks-president-osama-bin-laden>.
12. See Geneva Convention Relative to the Treatment of Prisoners of War, art. 130, Aug. 12, 1949, 75 U.N.T.S. 135 (defining “willful killing” as a “grave breach”); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, art. 40, June 8, 1977, 1125 U.N.T.S. 3 (prohibiting “denial of quarter”); Rome Statute of the International Criminal Court, arts. 8(2)(b)(xii), 8(2)(e)(x), July 17, 1998, 2187 U.N.T.S. 90 (defining policy “that no quarter will be given” as “a war crime”).
13. See J. Patrick Kelly, *The International Law of Force and the Fight Against Terrorism*, DEL. LAW., Summer 2003, at 18, 20.

President Obama launched air strikes against Libya in the spring of 2011.¹⁴ He promised that U.S. intervention was only directed at protecting civilians in Benghazi and would be over in days.¹⁵ The intervention went on for more than half a year, as its aim shifted from protecting civilians to ensuring the success of rebel forces seeking the overthrow of Libyan President Muammar Qaddafi.¹⁶ The Obama

14. See Charlie Savage & Thom Shanker, *Scores of U.S. Strikes in Libya Followed Handoff to NATO*, N.Y. TIMES, June 21, 2011, at A8.

15. The President's most extended public explanation came in a televised "Address to the Nation on Libya," delivered on March 28, 2011. President Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011), available at <http://www.whitehouse.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya#transcript>. Among other things, President Obama said:

[T]he pledge that I made to the American people at the outset of our military operations [was that] America's role would be limited; that we would not put ground troops into Libya; that we would focus our unique capabilities on the front end of the operation and that we would transfer responsibility to our allies and partners. Tonight, we are fulfilling that pledge. . . . Going forward, the lead in enforcing the no-fly zone and protecting civilians on the ground will transition to our allies and partners. . . . the United States will play a supporting role—including intelligence, logistical support, search and rescue assistance, and capabilities to jam regime communications. Because of this transition to a broader, NATO-based coalition, the risk and cost of this operation—to our military and to American taxpayers—will be reduced significantly. . . . The task that I assigned our forces—to protect the Libyan people from immediate danger, and to establish a no-fly zone—carries with it a U.N. mandate and international support. It's also what the Libyan opposition asked us to do. If we tried to overthrow Qaddafi by force, our coalition would splinter. We would likely have to put U.S. troops on the ground to accomplish that mission, or risk killing many civilians from the air. The dangers faced by our men and women in uniform would be far greater. So would the costs and our share of the responsibility for what comes next.

Id.

16. See *Libya and War Powers*, Comm. on Foreign Relations, 112th Cong. 89 (2011) (opening statement of Hon. Richard G. Lugar, Senator from Indiana). At a hearing of the Senate Foreign Relations Committee on June 28, 2011—three months after President Obama claimed military operations would be handed off to NATO allies—ranking member Richard Lugar pointed out that actual events had followed a different pattern:

United States war planes have reportedly struck Libya air defenses some 60 times since NATO assumed the lead role in the Libya campaign. Predator drones reportedly have fired missiles on some 30 occasions. Most significantly, the broader range of

Administration might thus have been criticized for misleading the public and still more for using misleading claims to conceal its larger strategic agenda. But there was little fuss when earlier White House claims about military intervention were invalidated by subsequent events in the Obama era.

The contrast is all the more striking because President Bush did at least seek and receive formal authorization from Congress to undertake military intervention in Iraq.¹⁷ President Obama insisted he did not need such authorization and thus did not seek it and did not receive it.¹⁸ He was not much criticized, however, for abusing presidential war powers.

And so with the aftermath in each country. President Bush was subject to intense, ongoing criticism for allowing Iraq to fall into chaotic violence after the toppling of Saddam. Some critics even protested the supposed inadequacies of the Iraqi tribunal that tried Saddam and sentenced him to death.¹⁹ Obama received very little criticism for allowing Libya to fall into violent chaos or allowing the Libyan dictator, Muammar Qaddafi, to be killed in the field by opposition guerrillas with considerably less due process than Saddam received.

Americans heard very little about the chaos and violence in Libya following the fall of Qaddafi, until the U.S. ambassador and other Americans were slaughtered by a well-planned terrorist raid against the U.S. consulate in Benghazi on September 11, 2012.²⁰ The administration spent weeks misrepresenting the facts of what happened, which did eventually (as truth seeped out) provoke much criticism.²¹ President Obama responded by insisting that those

airstrikes being carried out by other NATO forces depend on the essential support functions provided by the United States.

Id.

17. Authorization for Use of Military Force Against Iraq 2002, Pub. L. No. 107-243, 116 Stat. 1498.
18. See Authority to Use Military Force in Libya, Memorandum Opinion for the Attorney General 5 (Apr. 1, 2011) [hereinafter Authority to Use Military Force in Libya], available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>. For criticism see Michael J. Glennon, *A Comment on Justice Department's Libya Opinion*, HARV. NAT'L SECURITY J. FORUM, Apr. 2011, at 1.
19. See, e.g., M. Cherif Bassiouni & Michael W. Hanna, *Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein*, 39 CASE W. RES. J. INT'L L. 21 (2007).
20. Helene Cooper, *U.S. Shifts Language on Assault in Benghazi*, N.Y. TIMES, Sept. 20, 2012, at A8.
21. For one effort to unravel the misrepresentations, see *Benghazi Timeline*, FACTCHECK.ORG, <http://www.factcheck.org/2012/10/benghazi-timeline>

responsible for the attack would be “brought to justice.”²² Almost no one asked about how this would be done. Such legalistic inquiries were out of fashion in the Obama era.

I believe the point could be extended through a number of other contrasts but these examples are sufficient to establish the point. And that point is broader than a protest against partisan hypocrisy. The relevant point here is that standards for the conduct of security policy, particularly outside the United States, are not easily contained by legal standards. That does not mean that law has no place in debates about foreign or security policy. But it does mean that law is bound to be less reliably respected or less consistently applied in international disputes.

Debates in the Bush era might have been less angry and moralistic if this truth had been more widely acknowledged. Events in the Obama era might have been viewed with more appropriate skepticism if this truth had been remembered. Goldsmith’s account encourages readers to imagine that we emerged from untrammelled executive willfulness in President Bush’s first term into an era of standards and constraints in later years. That was always unlikely.

It was unlikely for reasons illuminated by Goldsmith himself in *Law for States*. That analysis does not appear in the new book, but it sheds much light on the events described there and perhaps even more on events that unfolded in Obama’s first term.

II. INTERNATIONAL LAW OFTEN LIVES BY EXCEPTIONS

The Goldsmith-Levinson article starts with the common complaint that international law is not real law because it does not have the requisite clarity and detail.²³ The authors acknowledge various reasons. Notably, when treaty law or customary law is ambiguous, there is no international legislature to offer new provisions. International courts can rarely offer guidance, because access to such courts is severely limited. The main theme of the article is that quite comparable difficulties arise in domestic

/ (last updated Nov. 26, 2012). For another compendium of false claims, see Michael Pearson, *What Obama Administration Has Said About Libya Attack*, CNN (Oct. 2, 2012, 12:39 PM), <http://www.cnn.com/2012/10/01/politics/libya-attack-statements/index.html>.

22. The president reaffirmed his determination to see perpetrators of the Benghazi attack “brought to justice” in his second debate with Mitt Romney. Critics interpreted the phrase as a threat to bring down more drone strikes on suspects. Glenn Greenwald, *U.S. Justice Likely Coming Soon to Benghazi with Extrajudicial Executions*, THE GUARDIAN (UK), Oct. 19, 2012, <http://www.guardian.co.uk/commentisfree/2012/oct/19/benghazi-attack-suspects-drones>.

23. See Goldsmith & Levinson, *supra* note 3, at 1792–93.

constitutional law, since the Constitution is (like international conventions) very hard to amend by formal process and many key issues are not settled by courts.

Though Goldsmith and Levinson do not emphasize it, these problems are particularly acute—in both international law and domestic constitutional law—when it comes to security issues. It is in this area where appeals to law most often seem to founder on the difficulty of achieving agreement on what the law is or what it requires. Trade treaties often include long supplements covering many distinct issues in great detail. Major trade agreements, such as those establishing NAFTA and the World Trade Organization, make provision for compulsory arbitration of disputes, allowing the accumulation of clarifying case law.²⁴ When it comes to security issues, however, there is less treaty law and far less resort to international tribunals. In this area, there are almost no provisions for compulsory arbitration because states have rarely been willing to entrust decisions about the use of force to international arbitration.

One consequence is that policies can be unavowed, even if they are not (or cannot be) fully concealed. The White House allowed leaks to reveal American involvement in cyberattacks on the Iranian nuclear program but refused to provide any official clarification of the underlying policy.²⁵ NATO assistance to anti-Qadaffi rebels in Libya was handled in the same way. NATO's initial intervention was justified under a UN Security Council resolution authorizing

24. The official text of the North American Free Trade Agreement, as published by the U.S. Government Printing Office, runs 567 pages for the main agreement, then includes a volume of “annexes” of roughly equal size, followed by three more volumes, setting out the “tariff schedules” provided by each of the three parties to the agreement. North American Free Trade Agreement (G.P.O., 1992). The Organization of American States might be considered the security counterpart to NAFTA; the entire OAS Charter runs to less than twenty-five pages in standard format and the provisions most relevant to security—“Pacific Settlement of Disputes” and “Collective Security”—run less than two pages. CHARTER OF THE ORGANIZATION OF AMERICAN STATES, arts. 24–28. The World Trade Organization is responsible for coordinating compliance with global trade agreements. There are some sixty agreements in all, totaling some 550 pages. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154; *WTO Legal Texts*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/docs_e/legal_e/legal_.htm. By contrast, the UN Charter, in a standard format, runs to less than 25 pages. The provisions most directly relevant to security run less than five pages. U.N. CHARTER, arts. 33–51.

25. See Peter Beaumont & Nick Hopkins, *U.S. Was ‘Key Player in Cyber-Attacks on Iran’s Nuclear Programme,’* THE GUARDIAN (UK), June 1, 2012, <http://www.guardian.co.uk/world/2012/jun/01/obama-spiced-up-cyberattack-iran>.

protection for civilians.²⁶ Plainly, NATO ended up doing quite a bit more than that. But it did not say that it was shifting to a new policy. Nor did it bother to indicate whether it had changed its view of what authorization might be needed for the wider intervention it actually pursued.

It is easy in such cases to charge governments with concealing or disguising their actual policies to avoid having to answer for them. But it seems to me there is a wider problem. International law depends a great deal on practical precedent—that is, real-world events rather than judicial interpretations of them—since disputes are so rarely brought before international tribunals, especially on security related issues. It is even rarer that international tribunals are recognized as establishing authoritative precedents.²⁷

So international law often relies on rough analogies, based on the principle that what one nation may do, every other has the same right to do. That in turn means that every time a nation acts in a disputable way, it is in danger of establishing a dangerous precedent in the hands of its enemies or its rivals. A court can say that its decision should not be taken as a precedent—as the Supreme Court actually did say in *Bush v. Gore*.²⁸ A foreign ministry cannot so readily say the same. If it does, it has even less hope of getting others to accept the claim.

The International Court of Justice (ICJ) tried to square this circle in the Nicaragua case: There is a customary law of armed conflict, the ICJ found, even if it seems to be frequently violated.²⁹ Governments confirm their support for that law when they claim their actions are not covered or are distinguishable, rather than denying the existence of any rules.³⁰ That may not convince skeptics that there is enough law for an international tribunal to decide particular disputes based on that law.³¹ But as Goldsmith and Levinson note, there are many domestic constitutional issues that remain comparably unsettled.

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

27. See *U.S. Will Not Fully Recognize World Court Decisions*, ASSOCIATED PRESS (Oct. 8, 1985, 3:54 AM), <http://www.apnewsarchive.com/1985/US-Will-Not-Fully-Recognize-World-Court-Decisions/id-92a3c7ce6dd927522b53b743f5cf466e>.

28. “Our consideration is limited to the present circumstances, for the problem of equal protection in election process generally presents many complexities.” *Bush v. Gore*, 531 U.S. 98, 109 (2000).

29. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 92–97 (June 27).

30. *Id.* at 98.

31. See e.g., Anthony D’Amato, *Trashing Customary International Law*, 81 AM. J. INT’L. L. 101, 101–02 (1987) (criticizing the ICJ approach to customary law in Nicaragua ruling for supposing that generalized support for abstract norms can establish concrete customary practice).

Take the question of when or to what extent the president can deploy force abroad without a declaration of war. The Supreme Court has treated this as a “political question” on which courts may not rule.³² The Court has explained that it must bow out of “political questions,” that is, questions that do arise under the Constitution, but on which courts cannot pronounce. These questions are said to lack “judicially . . . manageable standards.”³³ If that is not a tautology (there will not be judicial standards if courts decline to craft any), it seems to imply that in questions like this, there cannot be firm rules.

It does not follow that there is no law of any kind. Certainly, it does not follow that there are no standards or criteria with that element of moral authority we generally associate with law. Rather, courts seem to fear that by pronouncing on such disputes, they might endorse or overemphasize some criteria and then exclude or marginalize others. What the political question doctrine does is keep a range of arguments and considerations in play. Without involvement from courts, we cycle through familiar arguments over and over. Objections that fail to stop the president in one episode may still be deployed, perhaps with more effect, in the next. In the right circumstances, somewhat abstract legal arguments may have considerable constraining force.

The Libyan intervention is an apt example. The Obama Administration claimed, at the outset, that no congressional authorization was required because U.S. involvement would be minimal, the fighting would be very brief, and the purpose was to assure respect for UN resolutions.³⁴ Subsequent developments belied each of these claims. Is U.S. participation in the bombing of Libya, then, a precedent for future presidents? Does it serve as a precedent for humanitarian intervention, so long as there is some sort of UN authorization? Or does it matter whether the Security Council has actually authorized the scale of intervention that ultimately develops? Does the presence of UN authorization of some kind mean the president is free to act without any sort of authorization from Congress? A president who assumes Libya is a clear precedent for acting without Congress will likely discover otherwise, if his military intervention results in significant U.S. casualties. The ambiguous Libyan “precedent” of 2011 will not stop critics from invoking

32. At least, when lower courts dismissed challenges to the legality of the undeclared war in Vietnam, the Supreme Court repeatedly affirmed these rulings. *See* *Atlee v. Richardson*, 411 U.S. 911 (1973); *Velvel v. Nixon*, 396 U.S. 1042 (1970); *McArthur v. Clifford*, 393 U.S. 1002 (1968); *Mora v. McNamara*, 389 U.S. 934 (1967).

33. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

34. *See* *Authority to Use Military Force in Libya*, *supra* note 18, at 1.

constitutional limits when they protest a more costly or controversial (and still congressionally unauthorized) intervention in future years.

The silence of Congress is no assurance of congressional support, least of all for a subsequent venture. Congressional passivity preserves political space for critics to raise objections in the future, since the objections were not squarely addressed, and thus, never decisively repudiated. Arguments left on the sidelines in 2011 may prove much more effective against the next intervention, even if it seems analogous to the pattern in Libya, if the new war proves more costly or more unpopular. One can say the same about the United Nations, which allowed expansion of the initial NATO mission to proceed without formal rebuke. That does not mean the Security Council is on record as approving the ultimate mission.

Justice Robert Jackson famously described the powers of the president, in that area between explicit congressional authorization and express congressional prohibition, as operating in a “zone of twilight.”³⁵ It was a good metaphor, even before Rod Serling took it up. What happens in twilight will be seen, at best, in a dim light. In such light, observers may discern moving objects, but not see clearly what they are. Mere shadows may be mistaken for actual objects. What happens in twilight is likely to be interpreted differently by different observers.

The absence of clarity threatens reliable application of rules. But it helps to preserve general support for norms, despite disagreements about their particular applications or their follow-on implications. Commentators often speak of the “gravitational pull” of particular rules or norms. It is another good metaphor. That is doubtless why it gets invoked both in international law and in various fields of constitutional law.³⁶ Advanced technologies have allowed us to overcome the force of gravity when we want to do so. But it requires a great deal of concentrated energy to launch a rocket or keep a jet plane airborne, because gravity still has an effect. So, too, general norms may exert continuing influence.

It might be that we cannot do much better when it comes to many international policy choices. It might be that we are asking too much when we suppose that law can be as constraining in international affairs as track routes are for locomotives.

35. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

36. *See, e.g.,* Edward Swaine, *Subsidiary and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT’L L. J. 1, 47 (2000) (referring to the “gravitational pull” of particular European Court of Justice doctrines in national courts).

III. POLITICAL CRIMES AND THE GRADATIONS OF IMMUNITY

There is a similar pattern when it comes to personal accountability—or its seeming converse, immunity. As Goldsmith records in his book, human rights groups urged the Obama Administration to prosecute Bush Administration officials for violating fundamental international norms, particularly the prohibitions against torture.³⁷ The Obama Administration made some gestures in this direction, insisting that investigations of CIA officers accused of torture must be reopened and reconsidered.³⁸ In the end, however, the Obama Justice Department declined to pursue actual prosecutions of any U.S. officials involved in Bush-era interrogation practices. Human rights advocates protested³⁹ but the protests were disregarded by leaders in both political parties and so sank into obscurity.

Accordingly, some human rights advocates have urged that, when it comes to Bush-era abuses, justice and the international rule of law should be vindicated by foreign courts or by international tribunals.⁴⁰ But that remains quite unlikely. Here again, differing priorities get in the way, and international law actually mirrors comparable gaps in domestic law.

There is now an International Criminal Court (ICC), which has been operating in The Hague since 2002.⁴¹ Since the 1990s, a number of states have claimed universal jurisdiction to prosecute the most extreme human rights violators.⁴² But there is still no actual precedent for the prosecution of government officials from a major power by an external jurisdiction. Legal institutions are in place that might enable such a prosecution but it is surely not by mere chance that no such case has yet been pursued.

The ICC has turned out to be a very weak institution, completing only one prosecution in its first decade.⁴³ States can exempt

37. See GOLDSMITH, *supra* note 1, at 234–36.

38. Scott Shane, *No Charges Filed on Harsh Tactics Used by the C.I.A.*, N.Y. TIMES, Aug. 31, 2012, at A1.

39. See *id.*

40. See, e.g., *Ex-Powell Aide: Dick Cheney Fears Prosecution for War Crimes*, NBC, Aug. 31, 2011, http://www.nbcnews.com/id/44337958/ns/us_news-security/#.URwdDaXAdjR.

41. Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90.

42. See *Universal Jurisdiction*, AMNESTY INT'L, <http://www.amnesty.org/en/international-justice/issues/universal-jurisdiction> (last visited Feb. 13, 2013).

43. Alex Spillius, *International Criminal Court to Deliver First Verdict, 10 Years and £750 Million After It Opened*, THE TELEGRAPH (UK) Mar.

themselves from its jurisdiction—at least for potential crimes within their own borders—if they simply decline to ratify the ICC treaty.⁴⁴ Not only the United States, but Russia, China, India, Turkey, Brazil, and dozens of others have declined to ratify. In principle, ratifying states are pledged to extradite anyone indicted by the court that can be found within their borders.⁴⁵ In practice, states have broad discretion not to extradite, since the court has no means of penalizing states that fail to cooperate. For the same reason, the court cannot assure that witnesses will come forward or that necessary documents are produced.

Meanwhile, the bulk of the court's funding and public support comes from major states in the European Union.⁴⁶ The court has no means of forcing financial backers to continue their contributions. So it would be especially awkward for the court to offend major European states or their friends and allies.

There may still be cases where a weak government prefers to have one of its own nationals prosecuted at The Hague. There may be cases where a weak state has to accept prosecution of its own nationals at the demand of other, stronger states. Such partial justice may still be regarded as a form of justice. It remains true that the court does not have the capacity to view all offenders impartially. Establishing a fully international criminal court does not establish an international authority, capable of forcing all states to yield to the same law.

So it has proved with claims for universal jurisdiction. In Belgium, Spain, and Germany over the past decade, suggestions that prosecutors might pursue charges against top U.S. officials provoked angry American protests, followed by changes to the universal jurisdiction statutes to avoid such confrontations in the future.⁴⁷ As

13, 2012, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/democraticrepublicofcongo/9141687/International-Criminal-Court-to-deliver-first-verdict-10-years-and-750-million-after-it-opened.html>.

44. Article 12 limits jurisdiction to crimes committed by nationals of states party to the Statute or crimes committed on the territory of a state party. The UN Security Council can confer jurisdiction on other states through Article 13(b), but permanent members of the Security Council are unlikely to agree to jurisdiction against themselves or against states they seek to protect.

45. Rome Statute, *supra* note 41, art. 89.

46. Consilium, The European Union and the International Criminal Court § 2.6.3 (Nov. 2007).

47. *See Belgium Scales Back Its War Crimes Law Under U.S. Pressure*, N.Y. TIMES, Aug. 2, 2003, <http://www.nytimes.com/2003/08/02/world/belgium-scales-back-its-war-crimes-law-under-us-pressure.html>; Mark Landler, *Rumsfeld Faces War Crimes Suit in Germany*, N.Y.

between abstract commitment to universal justice and concrete concerns for national security (such as preserving friendly relations with a very powerful ally), states gave priority to the latter. Despite the excitement stirred by the attempted prosecution of Chilean dictator Augusto Pinochet in 1998, there has been no such prosecution attempted since then.⁴⁸

Rather than dwelling on the weakness of international justice, however, we might do better to remember that even national justice systems are often quite forgiving of past abuses by government officials. The United States waged war against Confederate rebels for four years but prosecuted no Confederate leaders after the South's surrender.⁴⁹ In more recent times, opponents of apartheid in South Africa waged a decades-long struggle for justice but accepted a general amnesty of apartheid era officials (and terrorist attacks by apartheid opponents) in order to achieve agreement on majority rule.⁵⁰ The same happened in Chile and in eastern Europe in the 1990s; leaders preferred reconciliation and stability to strict justice, so instead of prosecutions, there were amnesties.⁵¹

Every organized legal system makes provision for amnesties and individual pardons. There is no counterpart power at the international level. I believe that is because the pardon power is understood to reflect ultimate political judgments outside the normal limits of law. National legal systems almost always entrust this power to the executive, thus acknowledging that the executive is not simply bound by law or bound by law in all decisions. To acknowledge such authority on the international plane would be very difficult. It would say, in this case, that above the states of the world, there is a prosecutor who acts for humanity and he can judge on behalf of humanity when justice is better served by pardoning crime than by

TIMES Nov. 14, 2006, <http://www.nytimes.com/2006/11/14/world/americas/14iht-rumsfeld.3532840.html>.

48. See Luc Reydam, *The Rise and Fall of Universal Jurisdiction*, in HANDBOOK OF INTERNATIONAL CRIMINAL LAW 337–38 (William Schabas & Nadia Bernaz eds., 2010).
49. Despite a presidential order threatening capital punishment for the killing of black troops, no Confederates were punished for such war crimes. See *President Obama: Prosecution Possible for Those Who Authorized Torture*, ABC NEWS (Apr. 22, 2009), http://www2.wjbf.com/news/2009/apr/22/president_obama_prosecution_possible_for_those_who-ar-230298/ (noting that prosecution of former officials would be the first of its kind and that Lincoln refused to prosecute Confederate leaders, even though their actions amounted to treason).
50. See Jeremy Sarkin, *Achieving Reconciliation in Divided Societies*, YALE J. INT'L AFF., Spring/Summer 2008, at 11, 21.
51. See RUTI G. TEITEL, TRANSITIONAL JUSTICE 48, 95–97 (2000).

punishing it. The world is not quite prepared to say that in public. So there is no provision for a pardon power in the ICC Statute.

But international justice is not made stronger by concealing its weak foundations. If we cannot trust prosecutors to make authoritative decisions about pardon, we are, in effect, demanding that they conceal their political assessments. The ICC's first prosecutor, Luis Moreno-Ocampo, claimed that he had no need to worry about whether prosecution might provoke more violence by, for example, undermining a transition agreement or a cease-fire contingent on an amnesty. The prosecutor's job, he insisted, was simply to follow the law.⁵² One may hope he was not being fully honest. One can be sure that governments will not embrace such legalism—disregarding the ensuing death toll so long as a prosecutor's notion of law and justice is served.

The point is not that the powerful must always escape justice. But there is a cost to imposing justice. Saddam Hussein was finally brought to justice. Even many human rights advocates seem to think the cost of doing so was too high.⁵³ The costs are lower within a state that has well-established law. Still, President Ford judged that a

52. Questioned about the possibility that his attempt to prosecute the Sudanese head of state would prolong war in Sudan, Prosecutor Luis Moreno-Ocampo explained that his responsibility was “judicial”—that is, solely to the law: “I have no political responsibility,” he insisted. Thalif Deen, *Catch Me if You Can: Sudan's Case and ICC Tragicomedy*, SUNDAY TIMES (UK) Mar. 29, 2009, <http://sundaytimes.lk/090329/Columns/inside.html>. In a speech to the Tenth Session of the Assembly of States Parties to the ICC Statute, the prosecutor elaborated:

[S]ome of the leaders sought by the [International Criminal] Court threatened to commit more crimes to retain power, blackmailing the international community with a false option: peace or justice. The efficiency of the Court will depend on how political leaders and conflict managers react to such blackmails. To contribute to peace and security, the Office of the Prosecutor has to hold the legal limits, it cannot be blackmailed.

Luis Moreno-Ocampo, Prosecutor of the Int'l Criminal Court, Address to the Assembly of States Parties (Dec. 12, 2011), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Statements/ASP10-ST-ProsecutorLMO-ENG.pdf. The Prosecutor made no effort to explain how it can be that efforts to “hold the legal limits” can never threaten peace or why there would never be a trade-off between peace and justice.

53. Romesh Rathnesar, *Samantha Power: Voice Against Genocide*, TIME (Apr. 26, 2004), <http://www.time.com/time/magazine/article/0,9171,994021,00.html> (“My criterion for military intervention—with a strong preference for multilateral intervention—is an immediate threat of large-scale loss of life,” she has said. “That’s a standard that would have been met in Iraq in 1988 but wasn’t in 2003.”).

prosecution of former President Nixon would be too politically divisive to be in the country's best interest. That assessment might still be debated. It is debatable because people care about upholding legal standards, but it is not the only thing they care about.

IV. COMPETING PHILOSOPHIC PERSPECTIVES

Contemporary political debates stir passions. One might think the ultimate stakes would be seen more clearly if viewed more abstractly. In fact, the same difficulties appear in classic accounts of natural justice from centuries ago.

Perhaps the most influential exponent of natural law, certainly for the American Founders, was the 17th Century English philosopher, John Locke. Prior to all positive laws enacted by governments, according to Locke, mankind was (and still is) obligated to the law of nature. That law "teaches all Mankind who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Liberty or Possessions."⁵⁴ In Locke's account, there is a standard of justice in the state of nature. There can be private property by mutual consent in the state of nature and agreement on precious metals as a medium of exchange.⁵⁵ Separate nations, which remain in a state of nature with each other, may establish borders by common consent.⁵⁶ So in principle, it would seem disputes between nations could be settled appeals to natural law.

Despite these promising premises however, Locke insists that rights in the state of nature are "very unsafe, very unsecure."⁵⁷ The law of nature contains exceptions for self-protection: everyone is bound by the law of nature "to preserve himself and . . . so by the like reason, *when his own Preservation comes not in competition*, ought he, as much as he can, to preserve the rest of Mankind."⁵⁸ The qualification giving preference to self-preservation allows for a natural right to "do Justice on an Offender"—imposing punitive harm to deter future attacks on the innocent.⁵⁹

The conflicts generated by such self-protective measures may explain why rights remain insecure in the natural state, where there is no "known and indifferent judge . . . to determine all differences according to established law" and no "power to back and support the

54. JOHN LOCKE, *Second Treatise*, in TWO TREATISES OF GOVERNMENT 271 (Peter Laslett ed., 1988).

55. *Id.* at 300–01.

56. *Id.* at 299.

57. *Id.* at 351.

58. *Id.* at 271 (emphasis altered).

59. *Id.* (emphasis omitted).

sentence . . . and give it due execution.”⁶⁰ Agreements to establish government make rights more secure for individual citizens, at least when governments are bound by law. But when it comes to dealing with foreigners, governments still must exercise a power that is not quite subject to law:

[W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variation of designs and interests, must be left in great part to the Prudence of those who have this Power committed to them, to be managed by the best of their skill, for advantage of the Commonwealth.⁶¹

Locke ultimately acknowledges, however, that such discretion is not unique to the management of foreign affairs. Locke advises that the executive must also retain broad power to make exceptions to the law, even in domestic affairs: there must be a “power to act according to discretion for the public good, without the prescription of law and sometimes even against it” because “it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities that may concern the publick; or to make such Laws, as will do no harm, if they are executed with an inflexible rigour, on all occasions, and upon all Persons. . . .”⁶²

The seeming contradictions are, after all, logical. If you think that the ultimate purpose of law is to secure rights, it makes sense that the law should give way to urgent claims about security (or even to humanitarian exceptions to legal justice).⁶³

The same equivocation following the same logic appears in the writings of Emer de Vattel, whose mid-eighteenth century treatise on the law of nations, *Le Droit des Gens* (The Law of Nations),⁶⁴ had enormous influence on the American Founders. The “first general law . . . established by nature among all nations,” according to Vattel, “is that each Nation should contribute as far as it can to the happiness and advancement of other Nations,” but each nation’s “duties toward itself clearly prevail over its duties toward others. . . .”⁶⁵ “The duty which nature has imposed upon Nations, as upon individuals, of self-preservation . . . would be to no effect if they had not at the same

60. *Id.* at 351 (emphasis omitted).

61. *Id.* at 366 (emphasis omitted).

62. *Id.* at 375 (emphasis omitted).

63. Hence, among other things, Locke makes explicit provision for a power in the executive to pardon offenses against the law. *Id.* at 375.

64. EMER DE VATTEL, *THE LAW OF NATIONS* (Charles G. Fenwick trans., Carnegie Institution of Washington 1916) (1758).

65. *Id.* at 6.

time the right to prevent any interference with its fulfillment.”⁶⁶ What, then, if a nation is “threatened by the increasing strength of a hostile power? . . . Will it be time to defend ourselves when we are no longer able to?”⁶⁷ Vattel does not minimize the challenge: “Prudence is a duty incumbent on all men, and particularly upon the rulers of nations, who are appointed to watch over the welfare of an entire people.”⁶⁸ Fortunately, wise statesmen can find ways to reconcile prudence and legality: “There is perhaps no case in which a State has received a notable increase of power without giving other States just grounds of complaint.”⁶⁹

Such concessions to exigency may, of course, undermine respect for law and principle. Appeals to law and principle, however, can go beyond the point where most of us would be willing to follow. The difficulty appears most clearly from the conclusions embraced by the most principled philosophical advocate for this alternate view, the Prussian philosopher Immanuel Kant. Kant dismissed the leading writers on international law (including Vattel) as “sorry apologists” because they actually preached a doctrine which left international obligation, hence, the hope of international cooperation and international peace, contingent on each nation’s own calculations of its own interests.⁷⁰ Kant preached the moral duty of law, as an end in itself. Literally: any thought to particular benefits (or costs) adhering to a universal law would, in Kant’s account, undermine the moral authority of law as a duty.⁷¹ So he denounced any sort of pardon power as improper, since a pardon power would imply exceptions to the moral force of law.⁷² Kant also denounced revolution, even under the most oppressive government, since revolution could never be justified by a general principle without undermining the citizen’s duty to obey the law.⁷³

In international affairs, Kant advocated a peace federation, which, by guaranteeing security to every state, would make it unnecessary for national governments to weigh their international duties against

66. *Id.* at 130.

67. *Id.* at 248.

68. *Id.*

69. *Id.* at 250.

70. Immanuel Kant, *Perpetual Peace*, in KANT: POLITICAL WRITINGS 93, 103 (H.B. Nisbet trans., Hans Reiss ed., Cambridge University Press 1991).

71. Immanuel Kant, *On the Relationship of Theory to Practice*, in KANT: POLITICAL WRITINGS, *supra* note 70, at 64–65.

72. See IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (John Ladd trans., Bobbs-Merrill Educational Publishing 1965) (1797).

73. Immanuel Kant, *Relation of Theory to Practice*, in KANT: POLITICAL WRITINGS, *supra* note 70, at 81.

their more immediate security concerns. As unlikely or impractical as the scheme might seem, it did at least face the underlying issue: if security is threatened, how can a government simply adhere to law without regard to consequences? Kant made freedom the center of his doctrine—the freedom to act morally by acting in accord with universal principles, rather than distracting personal concerns. In his essay on morality and politics, he embraced the maxim, *Fiat iustitia, pereat mundus* (Let justice be done, even if the world perish)—that is, justice at any price.⁷⁴ It is, in its own way, as logical as Locke's conclusion, once you accept Kant's very different premise: if the point of law is to demonstrate the moral freedom to obey a universal law, you shouldn't care about consequences to yourself or your fellow citizens.

Not many people want to follow this logic, however. Demands for adherence to law and principle are most convincing when the cost of adherence is expected to be quite affordable. Unyielding commitment to principle looks less attractive when it threatens to bring the sky crashing down.

V. CONCLUSION

It does not follow that there are no standards for international conduct, no norms even for normal times. But once we acknowledge that there will be exceptions, we will argue about when and where and how much—when we don't forget about constraining rules altogether (because the cost of non-compliance seems so small or the cost of full compliance so unacceptable).

Jack Goldsmith ends his book by acknowledging that the United States will eventually endure “another massive terror attack at home, perhaps one as catastrophic as 9/11,” prompting “recriminations against the presidency” and “recriminations against the accountability system for the presidency,” followed by an accretion of new powers in the executive and ultimately by a new round of complaints that executive powers have been abused.⁷⁵ “And so the cycle will begin again.”⁷⁶

I think Goldsmith is right about these predictions. But they come at the very end of his book, without acknowledgment of how much they call into question the general tenor of the preceding analysis. We do not have strong reasons to congratulate ourselves on the “accountability” mechanisms that restrained the Bush Administration and then failed to impose much serious constraint on Obama. The

74. Immanuel Kant, *Perpetual Peace*, in KANT: POLITICAL WRITINGS, *supra* note 70, at 123.

75. GOLDSMITH, *supra* note 1, at 248–49.

76. *Id.* at 251.

compromises reached in Bush's second term may have been sensible policy adjustments or little more than a reflection of the political balance at the time. Very likely, we will view the developments of recent years in a different perspective after the next great challenge to our security.

We may have no better alternatives. But we should not conceal from ourselves that the "law" surrounding national security policy remains tenuous, disputed and malleable and is most often interpreted by observers—both inside government and outside—driven by a range of political concerns, which are sometimes quite partisan and short-sighted. If we are in for "war without end," we must expect legal wrangling to continue, wrangling that may be intermittent, but will prove recurring and always, in the long term, indecisive.