Trumping International Law?

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Abstract: From bringing back waterboarding, to violating treaty obligations, to banning Muslims, Donald J. Trump has proposed numerous extralegal policies. We examine the implications of this disdain for legality, arguing that Trump’s frequent hostility and indifference to legal rules and institutions paradoxically impede his capacity to enact his promises and damage international law. To situate Trump’s legal politics, we draw comparisons with the Bush and Obama administrations. As constructivists note, the vitality of legal norms is dependent not just on one state’s actions, but crucially on others’ reactions. While Trump has gone beyond his predecessors in rhetorically attacking international law, the backlash he generates limits the realization of his agenda in part due to his failure to convince others to violate the law or revise legal rules in novel ways. When the administration does reluctantly pursue legal justifications for controversial policies, it is better able to overcome legal constraints and political opposition.

Resumen: Desde traer de vuelta el submarino hasta violar las obligaciones de tratados y prohibir el ingreso a los musulmanes, Donald J. Trump ha propuesto numerosas políticas por fuera de la ley. Examinamos las implicaciones de este desdén por la legalidad al argumentar que la frecuente hostilidad e indiferencia de Trump hacia las normas e instituciones legales impiden paradójicamente su capacidad de cumplir con sus promesas y perjudican el derecho internacional. Para contextualizar la política legal de Trump, hacemos comparaciones con los gobiernos de Bush y Obama. Como señalan los constructivistas, la vitalidad de las normas legales depende no solo de las acciones de un estado, sino fundamentalmente de las reacciones de los demás. Si bien Trump ha ido más allá de sus predecesores al atacar retóricamente el derecho internacional, la reacción adversa que genera limita el cumplimiento de sus objetivos, en parte debido al fracaso de Trump para convencer a otros de violar la ley o revisar las normas legales de maneras novedosas. Cuando el gobierno busca a regañadientes justificaciones legales para políticas controversiales, está mejor posicionado para superar las restricciones legales y la oposición política.

Résumé: Du rétablissement du «waterboarding» à la violation d’obligations de traité et à l’exclusion des Musulmans, Donal J. Trump a proposé de nombreuses politiques qui sortent du cadre légal. Nous étudions les conséquences de son mépris pour la légalité, en soutenant que son hostilité et son indifférence fréquentes envers les règles et les institutions de droit l’empêchent paradoxalement de tenir ses promesses et portent préjudice au droit international. Pour situer la politique légale de Trump, nous l’avons comparée à celles des administrations de Bush et d’Obama. Comme les constructivistes le soulignent, le dynamisme des normes légales ne dépend pas uniquement des actions d’un seul état, mais essentiellement de la réaction des autres états. Alors que
Trump va plus loin que ses prédécesseurs en attaquant rhétoriquement le droit international, le tollé qu’il provoque limite la réalisation de son agenda, notamment par son incapacité à convaincre les autres pays de violer les lois ou de réviser complètement les règles de droit. Lorsque l’administration invoque à contrecœur la loi pour mettre en place des politiques controversées, elle parvient plus facilement à surmonter les obstacles légaux et l’opposition politique.

Keywords: international law, norms, United States, human rights, Trump

Soon after the inauguration of Donald J. Trump, Goldsmith (2017) argued that “we are witnessing the beginnings of the greatest presidential onslaught on international law and international institutions in American history.” Over the ensuing two and a half years, many scholars and pundits have emphasized the United States’ stunning retreat from liberal internationalism. “Trade, alliances, international law, multilateralism, environment, torture, and human rights—on all these issues, President Trump has made statements that, if acted upon, would effectively bring to an end America’s role as leader of the liberal world order,” argues liberal Ikenberry (2018, 7). Realist Schweller (2018, 134) agrees, “[q]uestioning the very fabric of international cooperation, [Trump] has assaulted the world trading system, reduced funding for the UN, denounced NATO, threatened to end multilateral trade agreements, called for Russia’s readmission to the G7, and scoffed at attempts to address global challenges such as climate change.”

Across the political spectrum, there is broad consensus that Trump is undermining international legal norms and institutions, which the United States once championed, leading to chaos in the liberal order (Jervis et al. 2018, ix–xv). In this article, we examine the extent to which this is in fact the case. Has the Trump administration attacked international law in unprecedented ways? What can we learn from his success or failure in doing so about the vulnerability and resilience of international law in the face of challenges? In order to assess these problems, we analyze Trump’s legal strategy—including his and his administration’s rhetoric regarding international legal obligations and their efforts to coerce or persuade others to accept these positions—and associated interim policy outcomes in a variety of areas related to multilateralism and human rights. We further contextualize the administration’s legal strategy by comparing Trump’s policies with those of the recent George W. Bush and Barack Obama administrations.

Our findings suggest that Trump’s rhetoric is clearly distinctive and often crudely advocates actions that are contrary to international (and domestic) law. But we also find that previous administrations challenged international law, albeit in different ways. We identify three main variants of Trump’s legal strategy: hostility, indifference, and reluctant legal justification. Hostility includes overt attacks on the validity of international legal rules and institutions combined with explicit efforts to materially and normatively weaken them. Indifference is apparent when Trump advocates extralegal policies or withdrawal from international obligations without consideration of the legality of such actions. Justification occurs when administration officials and government lawyers offer legal rationalizations for controversial policies, usually because they face countermeasures or judicial challenges.

Trump’s clear preference for strategic hostility and indifference contrasts with both the Bush and Obama administrations, which more frequently used legal arguments to legitimate their policies. Both relied on lawyers and legal opinions to rationalize controversial practices, and, by doing so, both engaged in different forms of legal contestation. While Bush sought to withdraw and exempt the United
States from various international agreements, he also advocated a doctrine of American exceptionalism that acknowledged international legal provisions and asserted US leadership of the international community. Particularly during his proclaimed “Global War on Terror,” his administration engaged law as a constraint to be manipulated and evaded. In comparison, Obama did not argue for evading international law but instead embraced international law’s capacity to advance US power by reinterpreting legal provisions in ways that set precedents for others to follow.

Finally, in terms of outcomes, we argue that Trump’s strategic hostility and indifference toward international law has often hampered his ability to implement contentious policies, which have been subject to judicial checks and normative backlash in the United States as well as internationally. However, we find that the administration has been more successful in advancing its agenda when it pursues legal justification. We define “success” in this context as the capacity to substantively implement policy promises and political goals articulated in the administration’s rhetoric. While assessing in detail the status of international legal norms under challenge is beyond the scope of our analysis, we examine the extent to which Trump’s policies have damaged international law by either convincing other actors to violate legal rules or generating acceptance for new legal interpretations that hollow out the constraining or protective power of law. As we discuss in the final section of the paper, Trumpism may also do longer term damage to international law by challenging the legitimacy of legality itself. However, in the shorter term, we find that Trump’s approach highlights the paradoxical limitations of international legal strategies premised on attacking or ignoring legal rules: the ability to effectively undermine international law is ironically limited by the lack of strategic sensitivity to legal process and persuasion.

In the following pages, we develop this argument by examining several cases that exemplify the legal strategies we identify—hostility, indifference, and reluctant legal justification—tracing how they have affected Trump’s ability to fully realize his agenda so far. The administration’s rejection of multilateralism in general and the International Criminal Court (ICC) in particular reflect a strategy of hostility. However, we find that despite overt animus, Trump has not been able to damage targeted institutions as intended. Indifference toward international legal provisions can be seen in Trump’s promises to bring back torture of alleged terrorists regardless of existing legal prohibitions and in his withdrawal from the Paris Climate Agreement, which the United States previously signed. Once again, this strategy has not resulted in Trump’s rhetorical promises coming to full fruition. Finally, we look at the implementation of Trump’s migration policies, such as the evolving ban on travel from several predominately Muslim countries, as indicative of reluctantly proffered, and often poorly constructed, legal justification. Here, we observe the administration iteratively learning that legal argument can advance its goals, moving it closer to adopting legal rationalization strategies more effectively employed by Bush and Obama.

Our findings advance constructivist international relations and international law theory, which hold that the vitality of legal norms is based on mutual interaction and therefore dependent not just on actions taken by the United States alone, but crucially on others’ reactions (Brunnée and Toope 2010, 1–19; Panke and Petersohn 2017, 575–78; Deitelhoff and Zimmermann 2019, 3). US military, economic, and political power means its unilateral policies have influence, but international rules and institutions are not dependent on the whims of any one actor, even a strong one. Evidence so far suggests that many states in the international community have recoiled from Trump’s attacks and rallied to defend international law. This is due to pushback from many actors, both in the United States and abroad, who continue to vigorously defend legal principles. Even though a sustained period of Trumpist politics may erode opposition and empower illiberal actors who share Trump’s disdain...
for legalism, we agree with Koh (2018, 141) that “various techniques of resistance can be marshaled to good effect. The foreign policy tally thus far shows that Trump has not been winning.”

Despite identifying the limits of Trump’s ability to translate his rhetoric into reality, we are not optimistic that either a tempering of Trumpism in the face of opposition or a return to the status quo ante would usher in greater US respect for international law. Indeed, the shocking aspects of Trump’s rhetoric and policy agenda risk obscuring that American challenges to international law predate 2016 and will likely continue into the future. Despite its role in advancing liberal internationalism, the United States has long sought to exempt itself from binding international obligations (Ignatieff 2005, 3; Hopgood 2013, 96–118). Accordingly, a contextual examination of Trump’s policies provides a necessary corrective to arguments that frame his administration as wholly aberrant. Both the Bush and Obama administrations, to varying degrees, sought to evade and revise international norms. We argue that, in many instances, what most distinguishes Trump is his crude rhetoric and strategic missteps. Undoubtedly, Trump’s open racism, xenophobia, and disdain for the judiciary are distinctive, but it would be erroneous to ignore the roots of many of his policies in deep strains of American politics. Thus, even though a reversion to the legal politics of past administrations would shift US legal strategy toward greater engagement with international law, it would not necessarily ensure greater compliance. Indeed, many of the most troubling policies of prior administrations were conducted under the cover of “plausible legality” (Sanders 2018a, 2).

**Situating Trump’s Legal Strategies**

Much of Trump’s policy agenda challenges international legal norms and institutions. He has not shied from overtly endorsing illegality, declaring during the 2016 campaign that he would order waterboarding “in a heartbeat” and “a hell of a lot worse than waterboarding” (Johnson 2016). He promised to deter terrorists by killing their families, suggested the Geneva Conventions were excessively onerous, called for American citizens to be prosecuted at Guantánamo Bay, and pledged to ban Muslims from entering the United States (Sanders 2018b, 2–3). Moreover, he has backed Brexit, attacked the European Union, questioned the North Atlantic Treaty Organization, canceled the Iran nuclear agreement, withdrawn from UN bodies, and sought to revise multilateral environmental and trade deals. Trump’s break with liberal internationalist politics is further reflected in his unapologetic support for authoritarian and xenophobic leaders around the world and his flirtation with the so-called “alt-right” at home.

Trump’s advocacy of extralegality and illiberalism demands attention and concern. We do not discount that Trump’s extraordinary rhetoric can in itself be harmful, fomenting populist hostility to international legal commitments and encouraging like-minded leaders around the world. Yet, as we find in our case analysis of contemporary US policy, there is limited evidence that Trump has actually succeeded in realizing many of his most radical promises and proposals. For the most part, international legal rules and institutions continue to govern international politics and structure and constrain US policy. In other words, our findings suggest that the Trump administration has wrought less damage to international law than one would expect based on the president’s pronouncements.

We argue that comparisons with past administrations help shed light on why this is the case. US challenges to international law are not unique to the Trump administration. Bush and, to a lesser extent, Obama, also defied numerous international legal norms. Indeed, some scholars (e.g., Goldsmith and Mercer 2019, 21) claim that Trump is violating international law in similar ways to the Bush administration. However, we find that Trump differs from his predecessors in that they actively engaged with the terms of international law, even when challenging it. This is not to
say that they always complied with existing legal obligations, but that they utilized law to further their own policy agendas, resulting in distinct patterns of rule evasion and revision.

While the Bush administration often critiqued international law, it advocated a doctrine of American exceptionalism that asserted US leadership of the international community and the right to police “rogue” regimes such as Afghanistan and Iraq that purportedly threatened global order. After the 9/11 attacks, the president and members of his cabinet expressed frustration with legal restrictions on counterterrorism and argued that emergency measures were necessary to deal with the threat of terrorism. Yet, rather than simply ignore law in executing controversial policy, the Bush administration tasked lawyers with legally rationalizing torture, indefinite detention, targeted killing, and warrantless surveillance and evading legal limits by immunizing officials from criminal prosecution (Sanders 2018a, 52–53, 88–89, 133). Although hotly contested by human rights advocates, these legal arguments effectively reinterpreted and thus weakened constraints on state violence and undermined accountability norms.

As critics have noted, the Obama administration “continued, even at times inadvertently, the Bush administration’s challenge on international law” (Warren and Bode 2015, 176). However, there were differences. While the Bush administration aimed to evade constraining rules, the Obama administration sought to revise existing understandings of relevant international legal provisions in order to secure lasting buy-in from the international community. It framed policies in terms of relevant legal obligations and justified changes to those obligations with reference to “novel” threats from terrorist tactics, nonstate actors, and irregular noninternational armed conflicts. In this way, Obama sought to build on the legal system’s “essentially social function by transforming applications of raw power into legitimate power, thereby creating rights to apply power within certain structures using certain means” (Byers 1995, 1222). At the same time, Obama confirmed the normative structure’s influence on US interests and practices by justifying his policies in terms of international legal obligations (Birdsall 2018, 249).

Contextualizing Trump’s policy initiatives within recent US legal politics is important for understanding what is and is not unique about the current administration. Bush and Obama’s legal strategies of evasion and revision helped them violate and remake legal rules. In contrast, Trump evinces little appreciation of the instrumental or normative benefit of being perceived to act in accordance with international norms or institutions. His rhetoric is predominantly political, relying on charismatic authority and populist, nationalist, and racist appeals that attack or simply ignore the law. We argue that Trump’s tendency to respond to legal constraints with strategic hostility or indifference matters because political actors in the contemporary US and international legal environments must acknowledge and tactfully engage legal norms if they wish to convince others of the merits of their policies. Domestically, Trump’s often baldly extralegal rhetoric currently faces popular resistance as well as domestic bureaucratic and judicial checks. In the United States, officials risk social opprobrium or even prosecution for unlawful behavior and are therefore generally unwilling to execute obviously illegal orders.

Internationally, law serves important political functions, helping states control each other and justify their own actions. As Krisch (2005, 371) argues, “international law is both an instrument of power and an obstacle to its exercise; it is always apology and utopia.” States frequently invoke legality to adjudicate legitimate conduct. This is important because “losing legitimacy means losing power, and losing enough legitimacy may produce a situation in which American claims to power are unsustainable in practice” (Hurd 2007, 204). States must convince other states to accept their efforts to reinterpret or cast aside legal norms in order to maintain legitimacy. While international law is materially unenforceable against a superpower, scofflaw states may lose their allies, social standing, and soft power influence and initiate new rivalries that are undesirable.
Political leaders cannot do whatever they want without consequence, nor can they change the rules of the game by fiat. In both domestic and international contexts, extraordinary rhetoric alone is insufficient to alter or undermine law. Rhetorical action can persuade and coerce audiences to enact normative and policy change, but only if it resonates with its targets. Existing dominant culture and discourse bound the degree to which novel rhetorical arguments can gain traction, at least in the short term (Krebs and Jackson 2007, 45–46). When “arguments do not fit the dominant beliefs and cannot plausibly be reframed, then actors may attempt to shift the dominant framework, or put it in question” (Crawford 2009, 118). However, this is difficult for even structurally powerful actors to achieve unilaterally, particularly when they frame policies in terms of self-interest. These dynamics are especially relevant for international law insofar as “the framework of law establishes boundaries to the kinds of arguments that are legitimate and persuasive. That is why we should expect legal norms, on balance, to be relatively robust” (Sandholtz 2019, 141).

This is not to say that Trumpism is without consequence for international law. It has undoubtedly empowered illiberal actors in the United States and around the world. The loss of US hegemonic backing and leadership materially and ideologically weakens the post-WW II international legal order and its attendant international agreements and institutions (Ikenberry 2018, 8), even if this order was already in decline (Acharya 2018, 38). But for now, as we will show below, Trump has inspired extensive backlash that has slowed the progress of his stated policy agenda.

In the following sections, we trace these dynamics, demonstrating how Trump’s extraordinary rhetoric has been tempered by ineffective legal strategies, leading to policy continuity in areas where there is a record of US noncompliance and faltering efforts to launch new challenges in others. First, we examine Trump’s disdain for multilateralism and international organizations by considering his administration’s attacks on the International Criminal Court. Here, a strategy of hostility has had mixed results for the United States, pressuring the Court but at the same time rallying the ICC’s supporters. Next, we analyze Trump’s promises to bring back torture and his withdrawal from the Paris Agreement to combat climate change, both areas where indifference to legal obligations has created bureaucratic and institutional obstacles to realizing rhetorical promises. Finally, in contrast to the foregoing, we look at developing efforts to reinterpret and revise migrant and refugee protections as indicative of a strategy of reluctant engagement with legal justification. While the administration has not fully delivered in these areas, it has sustained controversial policies by leveraging legal arguments. This suggests that Trump may advance his political agenda and thus damage international law most effectively, when he manipulates rather than rejects or ignores legal norms.

Hostility to International Law: Attacking Multilateralism and International Organizations

Trump’s “America First” foreign policy eschews international cooperation and retreats from US global leadership (The White House 2017a). He emphasizes a nationalist understanding of American interests and has little regard for multilateralism and particularly international organizations. For instance, similar to the Bush administration, Trump has reduced financial support for the United Nations and withdrawn from the UN Human Rights Council (Haley and Pompeo 2018). He has rejected the Trans-Pacific Partnership trade agreement and has blocked the appointment of judges urgently needed to fill vacancies on the World Trade Organization’s Appellate Body.

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*As the United States has not indicated conditions for ending the crisis, the goal appears to be to destroy the World Trade Organization’s capacity to rule on trade disputes rather than achieve particular reforms (Browster 2019, 1426).*
While skepticism of multilateralism is not unprecedented and has deep roots in conservative strains of American foreign policy—thinking, Trump’s hostility is especially crude. Focused solely on hard power, the administration has systematically undermined the US Department of State, where many key diplomatic positions remain vacant (Drezner 2019, 726). Trump, moreover, is deeply opposed to multilateral treaties, preferring bilateral deals with individual countries. This was evident in draft executive orders such as “Auditing and Reducing US Funding of International Organizations” and “Moratorium on New Treaties” (Fisher 2017) floated early in Trump’s presidency. The latter set out to establish a review committee to reconsider US participation in existing and proposed new multilateral treaties, based on an understanding that international law interferes with domestic politics. Furthermore, it “imposes a moratorium on joining new multilateral treaties (other than those involving national security, extradition, and international trade) except upon the Committee’s review and recommendation” (White House 2017c). The order has not come into force yet, but even in its draft form, it exemplifies the Trump administration’s principled rejection of international agreements. This rejection has appeared in a particularly virulent form in the administration’s attacks on the International Criminal Court.

The International Criminal Court

The United States has long had a contentious relationship with international organizations, and in this sense, there is little new in Trump’s antagonistic posture toward the International Criminal Court. Concerns for US sovereignty and fears of being bound by the rules of a multilateral institution led the Bush administration to attempt to undermine the International Criminal Court by first “unsigning” the Rome Statute and then forcing poorer countries to sign so-called bilateral 98 agreements that excluded the United States from the Court’s reach (Birdsall 2010, 461). At the time, the United States exerted strong diplomatic and financial pressures, threatening to discontinue investment and aid in those countries that refused. Many were too weak to resist and signed the agreements. But many did not, and the resulting loss of strategic influence in those countries led Bush to eventually concede that such unilateral attempts to undermine the International Criminal Court did not advance US interests and that the policy should be eliminated (United States House of Representatives 2008).

During the second half of Bush’s presidency and the Obama years, the United States moved from hostility toward constructive engagement with the International Criminal Court. Even though the United States did not become a member of the Court, both administrations worked with it as an international criminal justice mechanism to hold individuals to account for grave breaches of human rights. Unsurprisingly, this changed when Trump took office. The administration’s overt hostility toward the Court became even more pronounced when Bush’s former Ambassador to the United Nations, John Bolton, was appointed as Trump’s National Security Advisor. Undermining the International Criminal Court seems to be a personal vendetta of Bolton who called the day of Bush’s Rome Statute unsigning “his happiest day in government” (Gazis 2018). In his first major public address, Bolton (2018) made it clear that the United States would revive its hostile posture, because the Court “unacceptably threatens American sovereignty and US national security interests.” The timing of the announcement was clearly meant to preempt the Court’s pending decision on the prosecutor’s request to open a preliminary investigation into the situation in Afghanistan, which had the potential to implicate US nationals. In line with Trump’s “America First” agenda, the White House threatened the International Criminal Court with a number of extreme and legally questionable measures, including negotiating more bilateral agreements, prosecuting ICC personnel in the US criminal system, and even utilizing the UN Security
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Council to stop the Court from acting. On March 15, 2019, days before the ICC Pre-Trial Chamber’s decision, US Secretary of State Mike Pompeo announced that the United States would make true on its threats and would withdraw or deny visa applications to anyone working on ICC investigations of US personnel in Afghanistan. He claimed “the ICC [was] attacking America’s rule of law” and that these visa restrictions would “convince the ICC to change course with its potential investigation and potential prosecution of Americans for their activities or our allies’ activities in Afghanistan” (De Luce and Williams 2019).

Notwithstanding Bolton’s (2018) claim that the Court is “already dead to us,” the Trump administration’s extreme hostility ironically suggests that it sees the International Criminal Court as a live and unwelcome constraint on US national interests. Its threats were thus intended to destroy the capacity of the Court to function. However, the Court was quick to respond that, “as a court of law, [it] will do its independent work, undeterred, in accordance with its mandate and its overarching principles of the rule of law” (Guardian 2019). Legally, Pompeo’s threats to sanction ICC staff and collaborators have limited or no effect. The existing UN Headquarters Agreement means that ICC personnel are able to travel to New York to report to the United Nations, and there is no domestic legal basis for prosecuting ICC personnel in US courts (Lederman 2018). Politically, the ramifications of renewed hostility toward the Court are potentially more serious. On April 12, 2019, 18 months after the prosecutor asked the Court to authorize its preliminary investigation into the situation of Afghanistan, the Court’s Pre-Trial Chamber ended the inquiry. Of course, it is hard to ignore the connections between US threats and the ICC’s decision to discontinue its investigations that would have potentially affected US nationals. However, it is also important to see the ICC’s decision in broader context to assess the Trump administration’s more direct impact on the Court (Whiting 2019).

Calls for ICC reform have been growing louder over recent years, but particularly so since the December 2018 Assembly of States Parties (ASP) meeting, when the United Kingdom, as a staunch ICC supporter, called for much-needed reforms (UK Foreign & Commonwealth Office 2018). This was followed by an open letter of the four previous ASP presidents that called for an independent assessment of the Court’s functioning (Zeid et al. 2019). The International Criminal Court is an institution with a history of well-documented problems, such as its perceived anti-Africa bias, its low rate of success in bringing trials to a close, and the challenge of overcoming lack of state cooperation (see, for instance, Ainley 2011). In this context, the Pre-Trial Chamber decided that opening yet another investigation that had little chance of success would not be in the “interests of justice” and would eventually harm the Court (International Criminal Court 2019). This decision is arguably a prudent one and is unlikely to lead to an unravelling of the Court. ICC supporters are rallying around it, pushing for much needed reforms to make the Court stronger and more effective. The Trump administration’s hostile posturing led a number of states to issue statements expressing their support of and their commitment to stand by the International Criminal Court2 (Moorehead and Whiting 2018). The long-term implications for the Court will need to be assessed in years to come. What is clear from reactions of other states, however, is that open US hostility toward the Court plays into the hands of oppressive and authoritarian governments that look to the United States as supporting their stance. It is not surprising that Sudan, for instance, thanked Bolton with a tweet: “Please Your Ex. Complete your fine work and do more favor to the justice in the World” (Abass 2018).

The Trump administration’s attacks on the International Criminal Court exemplify a strategy of overt hostility. It is fair to say that US threats hastened the closure...

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2 See, for instance, Mogherini (2018) addressing the European Parliament; France (France Diplomatie 2019) reaffirming its full commitment to the International Criminal Court; and Liechtenstein UN (2019) issuing a statement on behalf of 22 states in support of the Court.
of the Afghanistan investigation, although the inquiry was unlikely to proceed in any event. Yet, rather than fundamentally undermine the International Criminal Court as intended, the Trump administration may have done the opposite, boosting the Court’s moral capital and rallying its supporters. The International Criminal Court is undoubtedly weak, in part because of its own missteps, but evidence suggests that rather than abandoning the Court, US bullying provides inspiration for international criminal law advocates to reaffirm their commitments and renew their efforts.

**Indifference to International Law: Ignoring Treaty Obligations and Legal Commitments**

If strategic hostility toward international law is characterized by efforts to weaken and damage international rules and institutions, strategic indifference is reflected in policy promises that simply ignore legal commitments. Many of Trump’s policy initiatives fall into this category—indeed, it appears to be his default approach—proposing measures that are blatantly illegal or face substantial legal obstacles to realization without an accompanying plan to overcome such obstacles. Bureaucratic, institutional, and political pushback is particularly evident in domestic and international reactions to Trump’s endorsement of torture in violation of numerous legal principles, as well as his attempted withdrawal from the Paris Agreement. Yet, this is not exceptional as the Bush administration pursued similar policies while convincing US policy-makers and other states to acquiesce and even follow its lead, in part because it sought to construct legal cover for doing so.

**Torturing Detainees**

During the 2016 presidential campaign, Trump explicitly endorsed torture. This was striking, not because torture is unprecedented in American history, but because politicians rarely advocate grossly illegal actions. Without question torture is just that, forbidden by numerous international human rights and humanitarian treaties such as the UN Convention against Torture (1984) and the Geneva Conventions (1949). The torture prohibition is moreover widely agreed to be *jus cogens*, a fundamental legal norm that cannot be overridden. Torture is further proscribed in US law by constitutional norms, the Uniform Code of Military Justice, the federal antitorture statute, and more recent legislation such as section 1045 of the 2016 National Defense Appropriation Act (NDAA), which clarifies all interrogations undertaken by US officials must be consistent with the limitations of the Army Field Manual, including bans on waterboarding, beatings, and sexual humiliation. These legal constraints, combined with deep reticence among intelligence agencies and the military to revive torture practices, mean it would be exceedingly difficult for Trump to deliver on his promise to inflict “a hell of a lot worse than waterboarding” (Johnson 2016) on alleged terrorists.

As far as we know, Trump has only talked the torture talk. In contrast, Bush walked the torture walk. Indeed, we need not look too far back to find officially authorized torture. As extensively documented by the Senate Select Committee on Intelligence, the CIA’s post-9/11 “high value detainee” program systematically subjected suspected terrorists to “extraordinary rendition” (i.e., deportation outside of legal safeguards) to secret “black site” prisons for torture (United States Senate Select Committee 2014).

However, Bush did not publicly boast about torture. Instead, the administration went to considerable lengths to legally defend its controversial security programs. Legal advisors, particularly at the Office of Legal Counsel (OLC) at the Department of Justice, became key players in the development and execution of security policy.
Facing a risk averse CIA, the administration solicited the so-called “torture memos” to provide the agency with a “golden shield” (Sanders 2018a, 52). Two August 1, 2002, OLC memos argued that the president had absolute constitutional authority in wartime and that “enhanced interrogation techniques” did not meet the legal definition of torture (Birdsall 2016, 182–3). The OLC’s 2002 guidance was partially withdrawn in 2004, although a variety of enhanced interrogation techniques continued to be approved well into the Bush administration’s second term. Eventually, publicity and court rulings ended the program by 2007. Upon taking office, Obama rescinded OLC authorization for enhanced interrogation, and acknowledged torture had occurred. Yet, legal rationalizations for torture proved extremely effective, ensuring impunity for those who followed legal advice. There have been only limited criminal investigations and no high-level prosecutions for torture during this period (Sanders 2018a, 70). While international human rights advocates vociferously denounced the United States, there have not been any serious international consequences for the torture program. Rather, we now know that at least 54 other countries secretly facilitated or cooperated with extraordinary rendition and thus had little interest in criticizing the United States (Singh 2013, 6).

Despite Trump’s support for waterboarding and other illegal methods to interrogate suspected terrorists, there is little support for his approach today, either domestically or internationally. Congress, the Department of Defense, in particular former Secretary of Defense James Mattis, and the Department of Justice, all resisted reinstating torture. A January 2017 Draft Executive Order recognized that such opposition would be a “significant statutory barrier” to the resumption of the CIA interrogation program (Miller 2017). Even those most directly involved in past interrogation programs oppose reviving torture, defined as such, concerned with the legal and political risks of doing so. As former CIA Director Michael Hayden put it, “[i]f any future president wants (the) CIA to waterboard anybody, he better bring his own bucket, because CIA officers aren’t going to do it” (Woolf 2016). Current CIA Director Gina Haspel, who worked at an infamous Thai black site where enhanced interrogation occurred, offered her “personal commitment, clearly and without reservation, that under [her] leadership CIA will not restart such a detention and interrogation program” (2018). Military leaders further cited their “commitment to the rule of law and to the principles embedded in our Constitution. Our servicemen and women need to know that our leaders do not condone torture or detainee abuse of any kind” (Human Rights First 2016).

The human rights criticism and subsequent legislation that followed revelations of Bush-era enhanced interrogation techniques foreclosed the plausible legality of these methods and left US security officials reluctant to break the law. At times, Trump has signaled awareness of these constraints, arguing he would pursue “everything within the bounds of what you’re allowed to do legally” (Masters 2017). But as he does not appear to have a meaningful plan to undo the explicit restrictions of the 2016 NDAA, nor a legal strategy to reinterpret its provisions, these bounds remain limited. On February 2, 2017, a revised Executive Order that was circulated to National Security Council staff members stated the administration would not reinstate Bush’s very limited understanding of torture and would also not revoke Obama’s decision that all interrogation methods need to adhere to the Army Field Manual (Savage 2017).

In sum, Trump’s rhetorical support for torture is jarring. It is not without impact, threatening to increase cultural support for torture among Trump’s domestic political base and embolden abusive leaders around the world. However, he has not,

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3This international cooperation was strategic and not premised on the Bush administration’s legal rationalizations, which were more important for securing domestic impunity, but it is hard to imagine such widespread collusion with rendition, particularly in Europe, had Bush loudly advertised his endorsement of torture.
as far as we know (Kruzel 2019), revived the Bush administration’s torture program and is constrained in his ability to deliver on these rhetorical promises.

Environmental Protections

On June 1, 2017, Trump announced the US withdrawal from the Paris Agreement that had been negotiated by 195 countries in December 2015. The Agreement sets out goals for reducing greenhouse gas emissions to hold “the increase in the global average temperature to well below 2°C above preindustrial levels” (Article 2.1a). Obama had accepted the Agreement via an executive order and pledged to contribute US $3 billion to the Green Climate Fund. Throughout his presidential campaign, Trump criticized the arrangement, claiming that it was harmful to US businesses and workers. Even though this rhetoric starkly contrasts with Obama, rejection of climate change targets is not unprecedented, and Trump’s withdrawal is reminiscent of Bush’s similar “unsigned” of the Kyoto Protocol in March 2001. At that time, Bush was critical of the treaty in comparable terms, arguing that it was harmful to US businesses. However, in contrast to Bush’s Kyoto unsigning, which was broadly supported domestically and eventually encouraged other states to retreat from the treaty, Trump’s actions have faced considerable opposition (Bomberg 2017, 958–962). The difference is largely due to increased recognition that climate change poses a serious threat to global prosperity and stability and the terms of the agreements themselves. Regarding the latter, Bush challenged Kyoto’s concept of common but differentiated responsibilities to effectively claim that the deal advanced developing countries who were not required to cut emissions (White House 2001). The Paris Agreement’s more flexible and nonbinding framework and nationally determined reduction targets make it harder to convincingly challenge it in these terms, and Trump has not made serious efforts to win international support.

Six months after taking office, Trump followed through on his long-standing anti-climate change rhetoric, stating that, “in order to fulfil [his] solemn duty to protect America and its citizens, the United States will withdraw from the Paris Climate Accord . . . [and] begin negotiations to reenter either the Paris Accord or a really entirely new transaction on terms that are fair to the United States, its businesses, its workers, its people, its taxpayers” (White House 2017d). The official withdrawal statement was reinforced in subsequent G7 (2017, 2018) and G20 (2017, 2018) final communiques that reiterated the US decision. For instance, the United States exempted itself from parts of the G7 Bologna Environment Ministers’ Meeting communiqué (2017) in which the other actors reaffirmed their commitment to the Paris Agreement. Domestically, the Trump administration has underlined its stance by attempting to roll back multiple environmental regulations.

The Trump administration’s efforts to abandon and ignore the Paris Agreement point to a strategy of legal indifference. However, this posture faces legal and political obstacles and cannot convince other states to leave or revise the deal. First, in terms of the actual withdrawal process, Trump faces legal constraints. The Paris Agreement requires that notice of withdrawal can only be given three years after the treaty comes into effect, which meant that Trump had to wait until November 4, 2019, to start the official withdrawal process that takes one year to be fully implemented (i.e., November 4, 2020, one day after the 2020 presidential election). At the time of writing, the statement of withdrawal thus has no definitive legal effect. At the same time, however, by announcing the US withdrawal intention, Trump has undermined the US position to negotiate a “better deal” and has ultimately diminished its status as a global leader by not engaging with the terms of a widely accepted agreement. Accordingly, critics argue that rather than representing “a

\footnote{Trump reportedly issued more than 115 anticlimate change tweets between 2011 and 2017 (Matthews 2017).}
reassertion of American sovereignty,” in reality, [Trump] unilaterally surrendered our influence over the agreement to China and other BASIC [Brazil, South Africa, India and China] countries, which have reaffirmed their Paris commitment and will push the United States to keep their own” (Koh 2017, 437).

Secondly, there has been significant pushback from domestic and international actors. Domestically, several coalitions have formed that distance themselves from the government’s position: for instance, the US Climate Change Alliance, which comprises 23 US states representing 50 percent of the US population, and the “We Are Still In” group that claims the same level of representation commit themselves to upholding the objectives of the Agreement. The House of Representatives passed its first climate action bill in a decade in May 2019. Even though the bill is unlikely to go before the Senate, it sends a clear message to the government and underlines the Democratic Party’s position to uphold Paris Agreement commitments (House of Representatives 2019).

Internationally, Trump is also facing considerable backlash and increased isolation. After Syria and Nicaragua joined the Agreement, the United States became the only outlier. There has been widespread condemnation of US withdrawal (Carbonbrief 2017). On the day of the announcement, Germany and China reaffirmed their commitment to Paris and announced they would deepen their ties. Angela Merkel stated that “[w]e are living in times of global uncertainty and see our responsibility to expand our partnership in all the different areas and to push for a world order based on law” (Reuters 2017). The evidence so far thus points to little traction for Trump’s rhetorical posturing and strategic indifference. The Agreement has not unraveled and other states have not walked away from it—rather the opposite. While it is true that, in the longer term, US withdrawal could incentivize others to shirk their voluntary obligations (Goldsmith 2019, 412), for now countries are rallying in support. For instance, in an unusual step, the G20 leaders (apart from the United States) called Paris an “irreversible step” in their 2017 and 2018 final communiques. This suggests that international law can persist without US leadership and is proving to be “flexible enough to accommodate dissenters; as some states retreat, we can expect others to step forward, as witness strong statements from the European Union and China of their commitment to the Paris Agreement” (Crawford 2018, 22).

Whether or not challenges to international law have lasting effects depends on the reaction of others because legal norms are outcomes of social interactions. The United States can most certainly pollute unilaterally, but it cannot undo hard-won multilateral agreements on its own. There are some indicators that the Trump administration is adapting to this reality. While the 2017 G7 communique restates the US decision to withdraw from the Agreement, the 2018 final declaration has far less hostile language. The document still includes a separate statement from the United States with regard to climate change, but does not mention the withdrawal and even references the Nationally Determined Contributions, which are at the very heart of the Agreement: “The United States will endeavour to work closely with other countries to help them access and use fossil fuels more cleanly and efficiently and help deploy renewable and other clean energy sources, given the importance of energy access and security in their Nationally Determined Contributions”5 (G7 2018). Indeed, since the withdrawal announcement, the administration’s stance has occasionally edged toward a stronger emphasis on “renegotiation” and the possibility of the United States rejoining the Paris Agreement (BBC 2018). However, a coherent legal strategy for doing so has yet to emerge. For example, at the June 2019 G20 summit in Japan, Trump reverted to a strategy of indifference by reportedly pressuring other states to remove any mention of the Paris Agreement from the

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5 Even though Trump eventually retracted US endorsement from the final communique, this was due to disagreements related to trade tariffs rather than the wording of the climate change policy (BBC News 2018).
Reluctant Legal Justification: Learning to Manipulate Legal Constraints

Trump’s political inclinations, leadership style, and ideological rejection of “globalism” lead him to reflexively pursue hostility and indifference toward international law. However, sometimes the administration proffers legal arguments to defend controversial positions. This most often occurs when policies face countermeasures or judicial challenges in international and especially domestic courts. While these arguments are contentious, they facilitate policy implementation.

Once again, comparisons with previous administrations are instructive. As previously noted, the Bush administration pursued legal justifications for torture, successfully evading accountability for human rights abuses. The Obama administration further advanced legal rationales for targeted killing of suspected terrorists. Rather than openly challenging international law, Obama consistently argued that targeted killing was permitted under international humanitarian law (Sanders 2014, 512). He dramatically increased US drone strikes and in order to establish an official policy for his actions, signed a Presidential Policy Guidance (PPG) in 2013. The PPG recognized that “international legal principles, including respect for a state’s sovereignty and the laws of war, impose important constraints on the ability of the United States to act unilaterally—and on the way the United States can use force—in foreign territories” (White House 2013). This was part of a long-term strategy aimed at contesting and ultimately changing the meaning of particular legal concepts related to the use of force and the laws of war (Birdsall 2018, 243). These efforts have been highly successful, arguably hollowing out international legal constraints to permit greater state violence. Targeted killing continues to enjoy widespread bipartisan domestic support and international acquiescence today.

For its part, the Trump administration has attempted to advance questionable legal arguments in several policy areas. For instance, it has legally justified steel and aluminum tariffs (and threatened to expand tariffs to cars) on not just China, but longtime allies Canada, Mexico, and Europe, invoking section 232 of the Trade Expansion Act of 1962, which permits trade restrictions on national security grounds (Galbraith 2018, 755). While such exceptions to the most-favored-nation principle have long been allowed under international trade rules, they have been raised just a handful of times in 70 years. In this context, the Trump administration appears to grudgingly appreciate the need to legally defend its policies in the face of WTO challenges, even though it would prefer not to, because legal justifications could legitimize tariffs and preclude lawful countermeasures by other states. Whether Trump’s national security arguments can prevail in WTO dispute settlement remains unclear (Pelc 2018). However, successfully legalizing Trump’s protectionist agenda would not necessarily benefit the United States economically because “bad cases make bad law” (Busch 2018). If the World Trade Organization were to accept the Trump administration’s arguments, the door is open for other countries to make similar claims, fundamentally undercutting global free trade norms and limiting trade that benefits the United States (Brewster 2019, 1428). In other words, Trump’s legal justifications could damage international law.

Migration and refugee policy is another area where the Trump administration has turned to reluctant legal justification. As discussed below in greater detail, legal pushback against its controversial policies has forced the administration to iteratively learn to take legal rationalization more seriously. While its initial missteps

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6In its first ruling on a related matter, a spring 2019 WTO decision accepted Russian invocations of national security to justify restrictions on Ukrainian transit across Russian territory, although it also ruled, contra the Trump administration’s position, that the substantive validity of security concerns is justiciable (World Trade Organization 2019).
slowed implementation of its agenda, the administration is increasingly effectively undermining international migration and refugee law as it learns to navigate legal constraints.

Migration and Refugees

The Trump administration’s most controversial and widely publicized attacks on human rights relate to issues of migration and refugees. Similar to his pronouncements regarding torture, Trump’s rhetorical assaults on migrants have frequently advocated unlawful policies. For instance, during the presidential campaign, he pledged a “total and complete shutdown of Muslims entering the United States” (Johnson 2015). Soon after taking office, the administration attempted to advance this policy, issuing a hastily written executive order temporarily suspending all refugee admissions and banning travel from seven predominantly Muslim countries (White House 2017b). Trump also attacked Latinos, deeming Mexicans “rapists” early in his campaign. In summer 2018, the administration sought to deter illegal entry by enacting a “zero tolerance” policy on the southern border, vowing to prosecute all intercepted migrants as well as summarily reject asylum applicants who crossed illegally. At the same time, it imposed metering on asylum claims at ports of entry, slowing the capacity of asylum-seekers to enter the legal system. Former Attorney General Jeff Sessions asserted that domestic and gang violence would no longer be recognized grounds for asylum. The president later advocated that migrants be denied due process of law in the United States and tweeted that “[w]e cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came” (Trump 2018). Most shockingly, the Trump administration began to forcefully separate thousands of migrant children, including infants and toddlers, from their parents, detaining them without clear documentation of their whereabouts, some of whom remain missing today. In summer 2019, humanitarian conditions on the southern border again reached a crisis point as men, women, and children were incarcerated in unsanitary and overcrowded migrant holding pens.

There is a long history of racially discriminatory migration policy in the United States (Cole 2005, 88–128). In the recent past, the Bush administration aggressively enforced immigration law, selectively targeting Arabs and Muslims who had overstayed their visas. It moreover created the National Security Entry-Exit Registration System, which subjected approximately 80,000 males from 25 predominantly Arab and Muslim countries to special registration and screening. Although eventually dismantled by the Obama administration, the Bush administration’s legal rationales for the program withstood years of court challenges (Federal Register 2016). For its part, the Obama administration detained an influx of unaccompanied minors, mainly from Central America, and expanded family detention. It did not seek to systematically separate children from parents, although many families were in fact ripped apart to facilitate prosecutions (Lovato 2018).

The executive branch has extensive discretion to forge immigration rules; however, these bounds are not limitless. Domestically, legislative and constitutional principles demand nondiscrimination and due process. The UN Refugee Convention (1951) guarantees the right to claim asylum, free from discrimination and regardless of illegal entry, and emphasizes the principle of nonrefoulement, which forbids states from forcefully repatriating refugees to danger. These provisions are integrated into US law. Trump’s initial dismissal of migrant rights oscillated between indifference and hostility toward these legal rules. For instance, soon after the travel ban from predominantly Muslim countries was announced, it became clear that the White House had conducted minimal legal and interagency review of the order (Gannon 2017). Confusion over the hugely consequential question of whether it applied to lawful permanent residents subsequently forced White House counsel to
clarify it did not (McGahn 2017). The Trump administration’s lack of attention to legal process left it vulnerable to legal challenges, and the order was stayed in federal court. In response to these judicial checks, White House advisor Stephen Miller invoked overtly hostile rhetoric, ominously declaring that “we have a judiciary that has taken far too much power and become, in many cases, a supreme branch of government . . . The end result of this, though, is that our opponents, the media, and the whole world will soon see as we begin to take further actions that the powers of the president to protect our country are very substantial and will not be questioned” (Blake 2017).

Despite the bluster, the administration could not escape the reality of legal constraints and was compelled to rewrite the travel ban several times to be more legally compliant. It eventually dropped Iraq, Sudan, and Chad and added non-Muslim countries such as Venezuela and North Korea. The third iteration of the order, stayed by the lower courts, and later subject to a Supreme Court case, does not mention religion and emphasizes the incapacity of targeted states to provide adequate security information (White House 2017e). In a sharply divided June 2018 opinion, Trump v. Hawaii, the Court’s majority ignored the president’s clearly discriminatory rhetoric, instead accepting the “facially neutral” (i.e., plausibly legal) quality of the revised order. In doing so, they deemed the ban acceptable because it complied with the letter of the law, even though it plainly violated the purpose of relevant legal protections (Búzás 2017, 858). The decision highlighted the efficacy of “rhetorical adaptation” (Dixon 2017, 84) or strategic efforts to more carefully legally rationalize controversial policies in light of dominant norms over the administration’s initial efforts.

When it comes to the Trump administration’s southern border initiatives, family separation was widely denounced across the US political spectrum. Internationally, the United Nations suggested child detention might amount to torture (United Nations OHCHR 2018). Like the travel ban, the policy was hastily implemented with minimal concern for legality. Political backlash forced Trump to issue an executive order suspending his own policy days after the controversy reached national headlines (Barrett, Dawsey, and Miroff 2018). As it is practically impossible to keep all those accused of illegal entry in family detention, which is both costly and subject to legal time frames, the administration’s capacity to fulfill its policy has been limited (Fernandez and Jordan 2018). While it may be able to expand “expedited removal,” which allows deportations of certain categories of undocumented migrants without an immigration hearing, US law does not permit deportations of declared asylum-seekers “with no Judges or Court Cases” (Trump 2018). Moreover, the administration’s efforts to summarily reject asylum-seekers who cross into the United States illegally were struck down by the Supreme Court (Liptak 2018).

As these examples suggest, the Trump administration’s chaotic and poorly planned efforts to apply its policies have periodically frustrated its agenda. At the same time, the Supreme Court’s eventual acceptance of the travel ban shows the strategic value of more careful legal justification over hostility and indifference for realizing policy goals. Trump has significant plenary power to shape US migration policy, as well as appoint judges, including Supreme Court justices, sympathetic to his political agenda. His invective against Muslims and Latinos emboldens racists across the country and (re)normalizes bigotry in the political culture. Moreover, the administration’s attacks on asylum-seekers may help propel similar efforts in other countries, particularly by Trump’s far-right allies in Europe. However, the president’s often clumsy legal strategy has frequently truncated policy and created
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room for legal challenges. He cannot radically alter legal rules by fiat. In this sense, Trump is more likely to achieve his policy goals by more cautiously and strategically engaging legal obstacles. This does not mean that legally rationalized abuse of migrants is ethically desirable, just as plausibly legal torture was not, nor is law necessarily synonymous with justice. But it does suggest that there remain, at least for now, roadblocks to extralegal policies.

In addition to its adapted travel ban, there are other signs that the administration may be learning the value of plausible legality. In particular, it is increasingly advancing a “safe third-country” argument, introducing a policy that forces non-Mexicans to wait in Mexico while their asylum claims are processed in US courts. As stated in a January 2019 Department of Homeland Security memo regarding the “Migrant Protection Protocols,” deportations under this framework should be consistent with the nonrefoulement principles . . . Specifically, a third-country national should not be involuntarily returned to Mexico . . . if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion . . . or would more likely than not be tortured, if so returned pending removal proceedings (Nielsen 2019).

Nods to legal rules may help the policy stand. A federal appeals court tentatively allowed it to proceed, impacting thousands of people, although further litigation is expected (Gonzales and Wamsley 2019).

A more extreme version of the safe third-country argument seeks to summarily reject Central American asylum applicants who pass through Mexico and Guatemala on their northbound journey to the United States on the grounds that these countries can safely resettle refugees. Canada and European nations have at times proffered similar justifications, and Canada and the United States have long had a Safe Third County Agreement that requires asylum-seekers to make claims in whichever of the two countries they first arrive, with some exceptions. The United States has pressed Mexico and Guatemala to conclude similar agreements, using threats of devastating tariffs to strike a deal (BBC 2019). In July 2019, a US federal judge halted the policy on the grounds that these transit countries are clearly not safe given high levels of crime, poverty, and corruption and have little capacity to absorb asylum-seekers (Sacchetti and Hsu 2019), but there is risk that the Trump administration could successfully leverage variants of the safe third-country legal justification framework to achieve its goal of reducing migration and, in the process, erode the substantive protections of the international refugee regime. In sum, the Trump administration has had mixed success in realizing its hardline migration policies. When it attempts to override or ignore constraining laws, it has often been blocked by the courts. However, more legally savvy efforts to reinterpret and manipulate legal rules have proved more fruitful.

Implications for International Law: The Limits and Dangers of Trumpism

We have identified several points of continuity and departure between the Trump administration and its predecessors’ policies as they relate to international law. In some areas, Trump has proved more overtly hostile to legal norms and institutions, contributing to many critics’ fears that liberal democracy in the United States and the liberal international order more broadly are in crisis (Levitsky and Ziblatt 2018, 8–10; Snyder 2018, 217–276; Sunstein 2018, vii–xi). Trump’s inclination to attack courts and judges suggests that he rejects the principle behind the rule of law itself, namely “that the law, rather than the whims of individual rulers, should govern the state and that all should be equally subjected to the law” (Havercroft et al. 2018, 6). However, it is also crucial to emphasize that, in many areas, Trump’s policies,
while distinctively concerning, are not novel. In their own ways, both the Bush and Obama administrations also challenged international law, through various forms of violation, evasion, and manipulation. In contending with Trump’s striking attacks on multilateralism and human rights norms, we should not make the mistake of obscuring or idealizing past US practice. US hegemonic leadership has helped animate and stabilize the international legal order since WW II, but this has not stopped US policy-makers from eschewing international agreements, rejecting international legal accountability, and authorizing human rights abuses, all the while maintaining the pretense of liberal legalism and global leadership.

The Trump administration has deployed varying legal strategies to advance its policy agenda: hostility, indifference, and reluctant justification. As evidenced by the case of US attacks on the International Criminal Court, hostile rhetoric and threats may have hastened the Court’s closure of its Afghanistan investigation; however, Trump’s attacks also rallied countries in support of the beleaguered institution, arguably strengthening its standing. Trump’s indifference to the challenge of overcoming the torture prohibition means that it is highly unlikely that the US military or intelligence agencies will agree to revive the post-9/11 torture program or worse. When it comes to the Paris Agreement, the United States cannot simply ignore the legal conditions for withdrawal, nor can it convince other countries to abandon or revise the deal without posing a meaningful alternative. In contrast, when the administration does deploy more fulsome legal justifications for its actions, because it is concerned about countermeasures (e.g., tariffs), or, in response to judicial challenges, it stands a better chance of both realizing its goals and damaging international law. For instance, the US Supreme Court accepted the travel ban from predominantly Muslim countries once the administration constructed justifications that plausibly complied with relevant laws. This may inspire the administration to become more legally engaged in enacting its antimigrant goals. If it succeeds, it will hollow out the obligations embedded in international refugee law.

What are the implications of Trumpism for international law? In the short term, if Trump’s default propensity for strategies of hostility and indifference persist, we expect continued political and judicial pushback that will hamstring the administration’s ability to fully deliver on its promises. “International law makes it easier for states to do some things (those that can be presented as lawful) and harder to do others (those that appear unlawful),” notes Hurd (2017, 2–3), because law helps actions to become “acceptable policy.” Moreover, strategic legal engagement allows the United States to reinterpret established provisions not only to make its own policy fit the existing framework, but also to alter legal norms to its advantage and build a more permissive normative order that is reflective of its own interests. As Ikenberry (2017, 6) argues, “[w]hen the United States embraces multilateralism, it gains greater public acceptance in other countries, particularly in Western democracies, making it easier for their governments to support US policy.”

Despite the limits of strategic hostility and indifference, Trumpism may damage international law longer term. Constant attacks from the United States put international law on the defensive and create political space for other advocates of extralegality to more boldly assert themselves. Trump’s rhetoric risks contributing to the broader normalization of the backlash against international cooperation, international human rights, and liberal democratic norms that is currently sweeping the globe. Moreover, Trump’s frequent complaints that rules are unfair and that other countries cheat may feed “compliance pessimism” that encourages other states to defect from agreements (Carnegie and Carson 2019, 739). US retreat from global leadership, even if that leadership was often hypocritical and imperialistic, creates a void in international relations. In the absence of strong material and ideological support for international law, nationalist and authoritarian leaders and forces will advance their power and influence, eventually reducing demand for legalistic justification in international politics. Within the United States, while Trump has failed to
convert the liberal internationalist establishment to his brand of populist nationalism, he has materially weakened countervailing institutions such as the Department of State and “can denude foreign policy bureaucracies of expertise and authority, letting those agencies drift and atrophy” (Drezner 2019, 728). Trump’s impact is further evident in public discourse, where his constant outrageous rhetoric seems increasingly commonplace and banal. Amplified online by fake news and disillusioned followers, it is shifting the middle of the political spectrum, making previously extreme right-wing policies seem moderate in comparison. Indeed, it is telling that some centrist pundits now pine for the Bush administration.

We have argued that Trump’s unique rhetoric and strategic hostility and indifference to law do pose a danger, but so do other approaches to evading and revising international law that manipulate rather than reject legal rules. Strategies of legal justification can ease the implementation of controversial policies and reduce domestic and international pushback. While the distinctly troubling positions of the Trump administration merit serious concern, in focusing on this particular moment in United States and international politics, we should not lose sight of long-standing American challenges to international law, which will likely persist well into the future.

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