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Title

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 extra-legal policies. In this article, we examine the implications of this disdain for legality, arguing that Trump's frequent hostility and indifference to legal rules and institutions as sources of legitimacy paradoxically impede his capacity to enact his promises and damage international law. As constructivists note, the vitality of legal norms is dependent not just on one state's actions, but crucially on others' reactions. To situate Trump's legal politics, we draw comparisons with the Bush and Obama administrations, identifying distinctive patterns in Trump's legal strategies and resultant interim outcomes related to multilateralism, in particular the status of the International Criminal Court and Paris Agreement, and human rights protections governing torture and migration. We find that while Trump has gone beyond his predecessors in rhetorically attacking international law, in practice he generates backlash that limits the realization of his agenda. This is in part due to Trump's failure to convince others to violate the law or revise legal rules in novel ways. However, we argue that when the administration does reluctantly pursue legal justifications for controversial policies, it is better able to overcome legal constraints and political opposition.

Keywords

International Law; Norms; Legal Justification; United States; Human Rights; Trump

Soon after the inauguration of Donald J. Trump, Jack Goldsmith argued that “we are witnessing the beginnings of the greatest presidential onslaught on international law and international institutions in American history” (2017). 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 John Ikenberry (2018, 7). Realist Randall Schweller agrees that “Questioning 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 G-7, and scoffed at attempts to address global challenges such as climate change” (2018, 134).

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 first, 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. Second, 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 extra-legal 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 legitimize 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 US 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 towards international law has often hampered his ability to implement contentious policies, which have been subject to judicial checks and normative backlash in the US 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 which 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 towards international legal provisions can be seen in Trump's promises to bring back torture of alleged terrorists regardless of existing legal prohibitions and in withdrawal from the Paris Climate Agreement, which the US 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 US 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 US 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 legalistic politics, we agree with Harold Koh that "various techniques of resistance can be marshaled to good effect. The foreign policy tally thus far shows that Trump has not been winning" (2018, 141).

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 ample evidence that American challenges to international law pre-date 2016 and will likely continue into the future. Despite its role in advancing liberal internationalism, the US 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 towards 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 EU, questioned NATO, 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 extra-legality 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 to 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, 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, non-state actors, and irregular non-international 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 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 extra-legal rhetoric currently faces popular resistance as well as domestic bureaucratic and judicial checks. In the US, 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 Nico Krisch argues, “international law is *both* an instrument of power and an obstacle to its exercise; it is always apology *and* utopia” (Krisch 2005, 371). 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 US and around the world. The loss of US hegemonic backing and leadership materially and ideologically weakens the post-Second World War 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 non-compliance 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 ICC. Here, a strategy of hostility has had mixed results for the US, 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 evidence 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 engages 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. He has rejected the Trans-Pacific Partnership trade agreement and has blocked the appointment of judges to the WTO's Appellate Body.¹

While scepticism 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 U.S. 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 re-consider 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" (The 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 ICC.

The International Criminal Court (ICC)

¹ As the US has not indicated conditions for ending the crisis, the goal appears to be to destroy the WTO's capacity to rule on trade disputes rather than achieve particular reforms (Brewster 2019, 1426).

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 towards the ICC. 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 ICC by first "un-signing" the Rome Statute (1998) and then forcing poorer countries to sign so-called bilateral 98 agreements that excluded the US from the Court's reach (Birdsall 2010, 461). At the time, the US 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 ICC 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 US moved from hostility towards constructive engagement with the ICC. Even though the US did not become a member of the Court, both administrations worked with the ICC 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 towards the Court became even more pronounced when Bush's former Ambassador to the UN, John Bolton, was appointed as Trump's National Security Advisor. Undermining the ICC seems to be a personal vendetta of Bolton who called the day of Bush's Rome Statute un-signing "his happiest day in government" (Gazis 2018). In his first major public address, Bolton made it clear that the US would revive its hostile posture, because the Court "unacceptably threatens American sovereignty and US national security interests" (Bolton 2018). The timing of the announcement was clearly meant to pre-empt the ICC's (at the time 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 ICC with a number of extreme and legally questionable measures, including negotiating more bilateral agreements, prosecuting ICC personnel in the US criminal system, and even utilising the UN Security Council to stop the Court from acting. On 15 March 2019, days before the ICC Pre-Trial Chamber's decision, US Secretary of State Mike Pompeo, announced that the US 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 claim that the Court is "already dead to us," (2018) the Trump administration's extreme hostility ironically suggests that it sees the ICC as a live and unwelcome constraint on US national interests. Its threats were thus intended to destroy the capacity of the ICC to function. However, the ICC 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" (The 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 UN and there is no domestic legal basis for prosecuting ICC personnel in US courts (Lederman 2018). Politically, the ramifications of renewed hostility towards the Court are potentially more serious. On 12 April 2019, 18 months after the Prosecutor asked the ICC 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 UK 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 Raad Al Hussein et al. 2019). The ICC 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 co-operation (see for instance Ainley 2011). In this context, the Pre-Trial Chamber decided that opening yet another investigation that had little chances of success would not be in the "interests of justice" and would eventually harm the ICC (International Criminal Court 2019). This decision is arguably a prudent one and is unlikely to lead to an unravelling of the Court. The ICC's 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 ICC² (Moorehead and Whiting 2018). The long-term implications for the ICC will need to be assessed in years to come. What is clear from reactions of other states, however, is that the US' open hostility towards the Court plays into the hands of oppressive and authoritarian

² See for instance Federica Mogherini (2018) addressing the European Parliament; France (France Diplomatie 2019) reaffirming its full commitment to the ICC; and Liechtenstein UN (2019) issuing a statement on behalf of 22 states in support of the ICC.

governments that look to the US 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 ICC exemplify a strategy of overt hostility. It is fair to say that US threats hastened the closure of the Afghanistan investigation, although the inquiry was unlikely to proceed in any event. Yet rather than fundamentally undermine the ICC as intended, the Trump administration may have done the opposite, boosting the Court’s moral capital and rallying its supporters. The ICC 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 towards 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 policymakers 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 American law by constitutional norms, the Uniform Code of Military Justice, the federal anti-torture statute, and more recent legislation such as section 1045 of the National Defense Appropriation Act (NDAA) of 2016, 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 (DOJ), 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 1 August 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, President 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 US, 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 US (Singh 2013, 6).³

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.

³ This international cooperation was strategic, 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.

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, “If 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 American security officials reluctant to break the law. At times, Trump has signalled 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 2 February 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, 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 1 June 2017, Trump announced 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 pre-industrial 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 "un-signing" 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 un-signing, 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 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 advantaged developing countries who were not required to cut emissions. (The White House 2001) Paris' more flexible and non-binding framework and nationally determined reduction targets make it harder to convincingly challenge in these terms, nor has Trump made serious efforts to win international support.

Six months after taking office, Trump followed through on his long-standing anti-climate change rhetoric,⁴ 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" (The White House 2017d). The official withdrawal statement was reinforced in subsequent G7 and G20 final communiques that reaffirmed the US' decision. For instance, the US exempted itself from parts of the G7 Bologna Environment Ministers' Meeting communique (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 (i.e. 4 November 2019) and that withdrawal will take a year to be implemented (i.e. 4 November 2020, one day after the 2020 presidential election). This means that at the time of writing, the statement of withdrawal has no legal effect. At the same time, however, by announcing the US' withdrawal intention, Trump has undermined the US' position to

⁴ Trump reportedly issued over 115 anti-climate change tweets between 2011 and 2017 (Matthews 2017).

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 re-assertion 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% 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 US 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 “We 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 unravelled and other states have not walked away from it—rather the opposite. While it is true that 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 US) 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 US 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. Whilst 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 US 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 towards a stronger emphasis on "re-negotiation" and the possibility of the US re-joining the Paris Agreement (BBC 2018a). 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 summit's final communique. He failed; the G20 again reaffirmed commitment to Paris' "irreversibility" and "implementation" (Woodcock 2019).

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 towards 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" (The 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

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).

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 aluminium tariffs (and threatened to expand tariffs to cars) on not just China, but long-time 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, there is evidence that the Trump administration grudgingly appreciates 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).⁶ However, successfully legalizing Trump's protectionist agenda would not necessarily benefit the US economically because "bad cases make bad law" (Busch 2018). If the WTO 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 US (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 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

⁶ In 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 are justiciable (World Trade Organization 2019).

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 (The 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, tweeting that “We 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 non-discrimination 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 *non-refoulement*, 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 towards 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 inter-agency 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 (The 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 UN 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 fulfil 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, American law does not permit deportations of declared

asylum seekers “with no Judges or Court Cases.”⁷ Moreover, the administration’s efforts to summarily reject asylum seekers who cross into the US illegally was 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 American 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 room for legal challenges. He cannot radically alter legal rules by fiat. In this sense, Trump is more likely to achieve his policy agenda 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 extra-legal policies.

In addition to its adapted travel ban, there is evidence that the administration may be learning the value of plausible legality. In particular, it is increasingly advancing a “safe third country” argument that would make non-Mexicans wait in Mexico while their asylum claims are being processed in US courts. As stated in a January 2019 Department of Homeland Security memo, deportations of asylum seekers back to Mexico under this policy should be “consistent with the *non-refoulement* 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). Such nods to legal rules may help the policy stand. A federal appeals court has tentatively allowed it to proceed, although further litigation is expected (Gonzales and Wamsley 2019).

⁷ In July 2019, the administration announced its intent to immediately deport undocumented migrants without pending court dates who could not prove presence in the US for the previous two years. While it is too early to evaluate this policy’s prospects for implementation, it would be extremely difficult to successfully defend in court considering its potential to undermine due process, encourage racial profiling, and ensnare lawful residents (Sacchetti 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 US on the grounds that these countries can safely resettle refugees. Canada and European nations have at times proffered similar justifications and Canada and the US have long had a Safe Third Country Agreement that requires asylum seekers make claims in whichever of the two countries they first arrive, with some exceptions. The US has pressed Mexico and Guatemala to conclude similar agreements, using threats of devastating tariffs to strike a deal with the latter shortly after unilaterally imposing safe third country restrictions on non-Mexicans arriving at the southern border (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 hard-line 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 US 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 American practice. US hegemonic leadership has helped animate and stabilize the international legal order since the Second World War, but this has not stopped American policymakers 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 ICC, hostile rhetoric and threats may have hastened the Court's closure of its Afghanistan investigation, however, they 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 US 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 anti-migrant 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 Ian Hurd (2017), because law helps actions to become "acceptable policy" (2-3). Moreover, strategic legal engagement allows the US 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) argues, "When 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 U.S. policy" (6).

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 extra-legality 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 US, 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 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 US 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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