

INTERNATIONAL LAW AND THE FOREIGN AFFAIRS CHALLENGES FOR THE NEXT ADMINISTRATION*

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I am going to talk about some of the challenges that face Trump administration officials as they enter into office. I started in the White House sixteen years ago this month in the beginning of February 2001. I had been a career official at the Justice Department, before I moved over to the White House in 2001. I spent four years at the White House as Legal Adviser for the National Security Council. I was in the situation room on 9/11. I spent much of my next four years dealing with terrorism issues, and then I moved over with Secretary Rice to the State Department, having managed her Senate confirmation and her transition.

So I've seen a lot of this movie before. Maybe not in quite the Technicolor that we are seeing right now, but I have seen the beginning of a new administration which comes in with conservative views on international law, on dealing with the bureaucracy. Particularly, I have seen how long it takes to get an administration up and going.

One of my takeaways from my first nine months in office before 9/11 was just how few political appointees we had across the U.S. government. When I came in with then Dr. Rice at the National Security Council (NSC), our NSC was pretty much fully staffed. But we did have the problem across the different departments that, other than the secretaries and the other deputy secretaries, it took a long time to get the departments and agencies filled up.

I also lived through mistakes made in a first term that then had to be corrected in the second term. I've lived through a lot of this before, but again not with quite the intensity that we are seeing here just in the first month.

So, let me talk about some of the challenges facing the Trump Administration, and of course we all know that there are many. I am going to touch on the ones that are preexisting. Some of the challenges are challenges of their own making. They have created challenges for themselves already, even before entering office, and then just in the month after entering office.

* This is an edited transcript of John Bellinger's address at the Georgetown Journal of International Law 2017 Symposium, "International Justice: Where We Stand, Where We Fall, and Where We Need to Be," held in Hart Auditorium, Washington D.C., on February 27 and 28.

A lot of the administration's approach to international and national security law is going to depend on the people that are put in place in the general counsel positions across the different departments and agencies.

On the positive side, I have heard a number of good names of people who may become the chief legal officers or general counsels of the different departments and agencies. If some of the names that I'm hearing go in, I think that will be a positive sign because they are solid, experienced people.

On the other hand, even if they're solid and experienced people and the decisions on some of these things continue to be made from the White House, then it doesn't matter whether we have good and solid and experienced people in the different departments and agencies. That is a challenge for those of you all who read *Lawfare*. It's something that we write about a lot right now; should one go in and serve right now? Can one be effective if decisions are made at the White House that agency lawyers are then forced to defend and may disagree with?

Right now we have a number of challenges already. We've seen the refugee and immigration Executive Order; we've seen the three leaked executive orders that were apparently circulated inside the White House but didn't go much farther than that after they were leaked. To a certain extent, it may be unfair to judge the administration fully on those because they hadn't actually been issued. On the other hand, the fact that those Executive Orders were even being prepared, and if they had not been circulated for comment just as the refugee Executive Order had not been circulated for comment, then they really would have been problematic. The first draft Executive Order would have essentially reinstated the CIA black sites. The second, which was sort of my favorite because it seemed to make so little sense, was an Executive Order devoted only to a review of all multilateral treaties, to review which multilateral treaties were not in our interest and from which the United States should withdraw. And then finally a third draft Executive Order that would have significantly decreased the funding of the United Nations and other international organizations.

Those three Executive Orders have not been signed yet, but they do give you a sense of at least where some people inside the White House were going and that's why I say it will depend on when the departments end up having chief legal officers. I think there would have been—at least from some of the people I know who would go into these positions—significant resistance to some of those Executive Orders.

With that introduction, I want to go through four or five challenges for the administration, starting with ISIS and terrorism and the legal

framework, and then a word about international tribunals, the International Criminal Court, the International Court of Justice, and then about treaties.

Let me start with the legal framework for fighting terrorism. This has been an issue that I personally have been working on for sixteen years. As I said, I was in the situation room on 9/11. I was involved initially in the drafting of the 2001 Authorization to use Military Force (AUMF). As you know the AUMF was passed about a week after 9/11 and has provided the statutory basis for basically all of the counterterrorism operations of the executive branch for the last sixteen years, for the Bush administration and the Obama administration. It authorizes all necessary force against the persons, organizations, and nations who committed the 9/11 attacks. So on the one hand, it is extremely broad because it is not geographically bounded; it authorizes “all necessary force.” But it is limited in one important way to the persons, organizations or nations that committed the 9/11 attacks.

What has happened over the last sixteen years as we’ve gotten farther away from 9/11 is that it’s been harder to say that groups that are “spin-offs,” or new groups that are only tangentially related to al Qaeda or the persons, organizations, or groups that committed 9/11 attacks. I can tell you even when I was in office, and that’s now eight years ago, we spent enormous amounts of lawyer time in the situation room debating whether a new group in Somalia or Yemen or elsewhere was in fact the covered by the 2001 AUMF.

For years many of us lawyers have felt AUMF of 2001 needed to be revised. I wrote an op-ed in the Washington Post about five or six years ago saying that it needed to be revised and it still does. Now, things have gotten even more complicated for those of you who follow this area. When the conflict with ISIS began, now almost three years ago, the Obama Administration first said that to use force against ISIS the President would rely on his Constitutional authority, which seemed to indicate that he felt he didn’t have authority under the 2001 AUMF. When faced with the war powers resolution sixty-day clock, he then switched legal theories and said that he was in fact relying on the 2001 authorization to use military force connected to the 9/11 attacks to use force against ISIS.

Now many people thought, including many of us who write for *Lawfare* and in fact most international lawyers except for those in the administration, that this was a very weak argument. Because ISIS is not al Qaeda. In fact, for those of you who follow the area, ISIS was sort of fired by al Qaeda, so they really are not the same group. So for the Administration to say that they were relying on the 2001 AUMF to use

force against ISIS was really a stretch. On the other hand, Congress had refused to pass a new authorization and so President Obama was faced with the choice of either stopping the use of force, relying only on his Constitutional powers and blowing through the war powers resolution, or taking this very strained interpretation of the 2001 AUMF saying that this authorization passed at that point thirteen years ago by Congress to use force against the perpetrators of the 9/11 attack really continued to provide authorization for the use of force against ISIS. So that's where things were.

My first challenge for the Trump Administration is that they need to sort out the legal framework for the use of force against ISIS. I'm not sure that President Trump himself is worried about these things, but his lawyers are going to need to be. Now, when I said that some of the challenges were preexisting, that's a preexisting challenge.

They may complicate this if the administration does what President Trump has said he wants to do, which is start sending people back to Guantanamo again. Because at that point if any ISIS members are captured and sent to Guantanamo, they then will have the right of *habeas corpus*. Then they will challenge their detention in court. One of the first things that they are going to say is: "You don't have legal authority to hold me because the 2001 AUMF was intended to be used against people who had committed the 9/11 attacks. ISIS is a different group and therefore doesn't apply to us." There are a number of reasons why the president and his lawyers should revise the 2001 AUMF. It's gotten to be very long in the tooth. It's not good government for Congress to be authorizing the conflict that we are actually fighting right now, but for practical reasons, if the administration really were to press forward with sending people to Guantanamo, which I hope they will not, and I would hope the Justice Department lawyers would argue against that, then there will really need to be clearer statutory authority from Congress. So, I think that is essentially a first six-month if not first three-month priority for the Trump Administration and its lawyers.

If they were actually to go further, and really engage in good government, the Administration should really go back and seek a revision of the War Powers Resolution. This would be a useful student note.

The War Powers Resolution has been on the books since 1973. It is largely either ignored or stretched beyond recognition by presidents of both parties. I would argue that President Obama stretched it far beyond recognition, further than even Republican presidents. I think, in part, he didn't want to rely on his Constitutional powers to wage war.

So he wanted say that he had statutory authorization from Congress. But since he couldn't get new statutory authority from Congress he therefore had to rely on old statutory authorizations and was relying on interpretations that were frankly just laughable. He was doing it so that he could say he was complying with the War Powers Resolution.

Interestingly, there was a national war powers commission that was chaired by former Secretaries of State Warren Christopher and Jim Baker about ten years ago (I testified before it). The commission concluded that the War Powers Act was irretrievably broken and needed to be revised. And they came up with their own text which was essentially a consultation device, and this is the part that's actually interesting, a couple of years ago, John McCain and Tim Kaine together got together to introduce legislation to revise the War Powers Resolution. That didn't go anywhere at the time, but if the Trump administration were really to try to address these legal problems with the legal framework for terrorism and use of force more generally, it would be to both replace the 2001 AUMF with either a broader one or an ISIS specific AUMF and to revise the War Powers Resolution. So that's a first challenge.

Let me turn now to a couple of international tribunals, both the International Criminal Court (ICC) and the International Court of Justice. The question here is how the Trump administration will address both of those. There are challenges already for the United States before both of these tribunals. Will the Trump administration work with those challenges or make things worse? A quick primer on the ICC: the United States of course is not a party to the Rome Statute. The Bush Administration took a fairly hard line position in the first couple of years of its administration and withdrew its signature formally from the Rome Statute. John Bolton has famously said that that was his happiest moment, when he signed the letter to the Secretary General saying the United States did not intend to become a party. In the second term of the Bush Administration, when I was Legal Adviser at the State Department, and with the backing of Secretary Rice, we took a more moderate, engaged position with the Court, basically saying we would work with the court when we felt that it was doing work that was important and useful and constructive. We abstained in the referral of the genocide in Darfur to the ICC and I gave a series of speeches between 2005 and 2009 emphasizing that we were prepared to work with the Court on various investigations around the world. The second term of the Bush Administration was very different from the first term.

The Obama Administration continued this approach to the ICC. The Obama administration did not of course submit the Rome statute

to the senate, saying that it was flawed, and was not going to send it forward. They did begin to participate as an observer in the assembly of state parties, which is the group of parties to the Rome Statute, and continued the cooperation on certain investigations.

That is where we are up to this point. The question is, what will the Trump administration do? Will they return to a virulently anti-ICC position that is similar to the Bush administration's first couple of years, or will they continue the trajectory that was started in the second term of the Bush administration and continued through the Obama administration of constructive engagement with respect to investigations that we feel are important? If they were to take a hard line position, what things could they do? They could stop participating in the assembly of state parties. I personally think this would be a mistake. I think it's better to be in the room to talk to people than to not be in the room; you can't do very much if you are not in the room. They could seek new legislation, a new American Service Members Protection Act that would go even further than the one that was passed in 2002. They could start pushing countries who are parties to withdraw. For those of you who follow this area, three or four different African countries have now withdrawn from the Rome Statute. The Trump Administration could try to continue that trend and find other ways to bully the court.

A lot may depend on decisions that are made by the Prosecutor. As you may know, the Prosecutor of the ICC is conducting preliminary inquiries into the U.K.'s actions in Iraq, United State's actions in Afghanistan, and Israel's actions in Gaza. If the Prosecutor takes the investigations of the United States, the U.K., or Israel to the next stage of broader investigations, and were to confront the United States directly, I suspect that would generate a strong reaction from the Trump administration. It would actually generate a strong reaction from any U.S. administration whether it was the Obama administration or a Hillary Clinton administration, if the Prosecutor were to move forward with an investigation of the United States beyond this preliminary investigation. It would be very difficult for the United States to just look the other way. I can imagine the Trump administration going farther. So, watch that spot with respect to the ICC.

The Prosecutor has people pushing her to investigate the United States, and the U.K. and Israel, particularly because so many—in fact all—of the investigations by the ICC have been of African countries. On the other hand, if she takes the investigations of the United States, U.K., or Israel forward, it would ruin any constructive engagement between the United States and the Court. It would essentially be a self-inflicted wound for the Court, so the Prosecutor is in a difficult spot.

Let me turn to another international tribunal. This one may be one that you are not following quite so closely: the International Court of Justice (ICJ). There is actually a contested case against the United States that has been brought by Iran before the international court of justice the Bank Markazi case. Iran has sued the United States before the International Court of Justice under the Treaty of Amity between the United States and Iran. I was a bit surprised actually to find that we are still party to the Treaty of Amity between us and Iran. And one of the reasons that I'm surprised is that Iran has sued us previously under the Treaty of Amity. This case arises out of the seizure of Iranian assets in the United States to pay terrorism judgments. Terrorist victims can sue state sponsors of terrorism under the Foreign Sovereign Immunities Act. There are probably more cases and more judgments against Iran than any other state sponsor of terrorism. In some of the cases the victims have gotten default judgments in the billions of dollars. And then the search is on to try to find Iran's assets, which has been difficult because overall there have not been very many Iranian assets in the United States, and the State Department has historically blocked efforts to seize the Iranian embassy and other Iranian properties.

A few years ago plaintiffs determined that there were some assets of the Iran Central Bank in the United States that nobody knew about. The plaintiffs attached those assets. Iran, in this case actually did defend itself—they usually don't—and said that these were sovereign assets that could not be seized to pay a judgment. It went all the way up to the Supreme Court in a case called *Bank Markazi v Peterson*. Somewhat surprisingly, the Supreme Court said Iran's sovereign assets could be seized to pay these terrorism judgments. So Iran then promptly sued the United States before the International Court of Justice under the Treaty of Amity, saying that that was a violation of international law, and of its sovereignty. That case is currently pending; it is in the early briefing stages.

I had defended a similar case against the United States when I was Legal Adviser. One of my first challenges in 2005, when I became legal advisor, was when we were presented with the ICJ's judgment in the *Avena* case involving the fifty-one Mexican nationals. And the question was: were we going to try comply with that? The Bush Administration in the second term decided to do so. Secretary Rice persuaded the President that we would try to comply with the ICJ's ruling rather than try to resist it.

So, what will the Trump administration decide to do with respect to this case before the ICJ in the next six months? Right now it's in the

jurisdictional stage. The United State's arguments are probably strongest on jurisdiction, saying that there simply is not jurisdiction to hear this case under the Treaty of Amity, having to do with the assets of the Central Bank of Iran. The United States has hinted about some of its arguments in some court filings, but has not made any filings—they are not due yet—in The Hague.

I would hope what will happen, certainly what I would do if I were Legal Adviser, is that the Administration will continue to defend the United State's position. We have good arguments, and will hopefully win. If we were not to win on the jurisdiction argument, we would go forward on the merits, which is what I did in the Medellín case, even though I had at least some people who said that we should not go forward. We'll see what the Trump Administration does.

We've already seen in the executive order that I mentioned on international organizations, at least some people in the White House have significant skepticism about international tribunals and courts. I can at least imagine some voices in the Trump administration saying that the United States should just stop litigating before the ICJ against Iran. I personally think that would be a big mistake. We do have good legal arguments, and of course when the United States doesn't take international law seriously, does not participate before international tribunals when we are obligated to do so, then it makes it very hard for us to criticize other countries, like China, when they don't participate in the tribunal involving the South China Sea.

Let me end with a few comments on treaties and international agreements. Let me start with some history and statistics that may surprise you and then take you to the present point. The Bush Administration—for those of you that followed—was not viewed, at least in Europe, as being a supporter of international law. This was difficult for me when I was Legal Adviser to try to persuade European allies differently. But here's the statistic: in the eight years of the Bush Administration we persuaded the Senate to give its advice and consent to 163 new treaties. That's more new international law in an eight-year period of time than at any point in American history. Many of those were multilateral treaties, treaties on the environment, conservation treaties, arms control treaties, human rights treaties, law of war treaties, some were bilateral treaties, mutual legal assistance, extradition, a broad array of treaties across a whole large number of different areas. My last two years as Legal Adviser, we pushed ninety treaties through the Senate in a two-year term. That is undoubtedly more new treaties and more new international law in two years than at any point in the history of our Republic.

Here's something that you were probably not taught in your international law class. Each of these treaties has to be personally transmitted by the President. This cannot be delegated. I used to write the memos to the President, and he would then transmit the treaty to the Senate seeking its advice and consent. Any point a treaty goes across the President's desk that he doesn't like and he says "why are we doing this?" he can stop it. Then there's a second bite at the apple, because remember, the Senate actually does not ratify treaties—the Senate gives its advice and consent to the President's ratification. The Executive Branch signs the treaty, the treaty is sent to the Senate for its advice and consent, then it goes back to the President again to ratify the treaty that he's signed with the Senate's advice and consent. It comes back to the President a second time for ratification. So these treaties went across President Bush's desk. That's a lot of new international law, a lot of which was multilateral, including law on the environment, human rights and other areas.

Since that period of time in 2009, we've really ended up in a trough on treaties and new international law. In the eight years of the Obama administration, only twenty treaties were approved by the Senate. That's probably the fewest in any eight-year term than at any point in American history; that's an incredible disparity.

Part of the reason, candidly, is that we had cleared so many treaties through the senate in the previous eight years that there were just not a lot in the queue. The other problem is that the Senate's been getting increasingly conservative and has not been approving treaties quickly. So this is the challenge for the Trump Administration: what is going to be their approach to treaties and international agreements?

There are a number of treaties that have been transmitted by President Obama, and some even previously by President Bush, that are still waiting before the Senate. Will the Senate act on those? Part of that will be: what does the executive branch ask? At the beginning of any new term, the executive branch prepares a Treaty Priority List, which is transmitted by the State Department to the Senate Foreign Relations Committee. It says "here are the treaties that are pending before the Senate, this is the order that we would like you to address them in." So watch this spot. Will this administration prepare a Treaty Priority List, or is it going to not be interested in any of these treaties that are pending before the Senate, bilateral, or multilateral?

What approach will they take to treaties? And will the executive order on multilateral treaties that was leaked actually go forward, even informally? I have to guess candidly that, whether there is an executive order on the subject or not, there will be some review of treaties. Now

this is highly unusual, I've never heard anything like this. There's always a review, in fact I used to lead it, about treaties that we have signed but not yet ratified to determine whether we want the Senate to approve them or not. That's the Treaty Priority List. But I've never seen a review of treaties to which the United States is already a party to see whether mistakes have been made, and to determine whether we ought to start withdrawing from them. In the Executive Order that would have required a review of multilateral treaties, the two treaties that were cited at the beginning in the preamble as the premise for the review were the Convention on the Discrimination Against Women and the Rights of the Child Convention.

Now, the United States is not party to either of those two treaties, so the premise of the draft Executive Order, which is that we're concerned about two treaties to which the United States is not a party, seems to be an odd premise. But maybe there was suspicion that some other multilateral treaties were snuck through during either the Bush, Obama, or other administrations, and we need to check to make sure that we are not party to treaties that are not in our interest. I've actually made some press statements on that, saying that I am not aware of any treaties that we have become party to in recent years that are not in our interest. I can certainly tell you that all of the treaties that we forwarded to President Bush to transmit to the Senate, the different departments and agencies and President Bush himself concluded that they were in our interest. But anyway, watch that spot with respect to treaties generally, the Treaty Priority List, and possible withdrawal from treaties.

Finally, I'll end with the two international agreements—much in the news, although maybe somewhat less recently—that are not treaties. One is the Iran deal and the second is the Paris Climate Change Agreement, which is a treaty under international law but not under U.S. law; it's an executive agreement under U.S. law. The Iran deal of course is not even an executive agreement; it is a political declaration. It is not actually legally binding, so it's not a treaty and it's not an executive agreement. It's not even an international agreement. It's not legally binding but the Trump administration could still back away from it. I think you'll recall the President's statement during the campaign that he thought it should be ripped up. So the question is should the President back away from the Iran deal? That's worth looking at.

Then finally, with respect to the Paris Agreement, that is an Executive Agreement that has been negotiated under the framework of the United Nations Framework Convention on Climate Change. It was not submitted as a treaty because the obligations in it were so non-intrusive

and non-burdensome that it did not rise to the level of something that needed to be submitted to the Senate.

Mr. Trump as a candidate said that he was going to cancel the agreement. That's not a known international law term, to "cancel" an agreement. But I think he probably means that he would try to get the United States out of it. The obligations on the United States are really minimal. The United States has to announce a carbon emissions target, which the Obama Administration did, but the target is not binding. If the agreement had been written in a way to bind the United States to reach that target, then that would have turned it into a treaty, but to simply have an agreement that said that we were going to announce a target was not sufficiently onerous that it needed to be treated as a treaty.

To get out of even those obligations parties cannot even announce their intent to withdraw under the agreement for three years, and then after a three-year period, if a party announces that it is withdrawing from Paris, then a party has to wait another year before the withdrawal is effective. So, at least, if the Trump Administration were to follow the terms of the treaty, it would be four years before the United States could actually withdraw, even from these non-onerous provisions.

The nuclear option, which I have suggested by some, is, if the United States ever were to withdraw from the entire United Nations framework convention on climate change, which we've been party to for almost thirty years, then that would effectively legally withdraw us from the Paris Agreement within one year. But that really would be the nuclear option.

QUESTIONER: I'm curious what you think constructive engagement with the International Criminal Court would look like from the government, especially with regard to the preliminary examination with the U.K. and the U.S. Is there anything the administration could do to persuade the Court not to move to the investigation stage, or anything else they could do to improve the relationship with the International Criminal Court?

JOHN BELLINGER: I think there are some things they could do. The Administration could continue to cooperate in the ICC investigations of countries in Africa, where the ICC may need U.S. help, or U.S. intelligence, or other cooperation, and then try to persuade the ICC prosecutor that with respect to the United States in particular, or the U.K. or Israel investigations, that they do not meet the criteria for gravity, which I really don't think they do.

The drafters of the Rome Statute did not intend the ICC to try to address every possible individual allegation of war crimes, but to focus

instead on the mass murders of the type addressed in the Nuremberg Tribunal. Unfortunately what's happened now is that every time a big country like the United States or the U.K. does something that people don't like, people complain to the ICC, but that's really not what the ICC is there for. And of course in all three countries — the United States, the U.K, and Israel — there have been investigations. Critics will say those investigations were not good enough, nobody ended up getting charged, but the fact is that there have been investigations. So I would think that would be the way one ought to address it, rather than getting into a public fight with the prosecutor, to try to persuade the prosecutor why it is not in Court's interest essentially to pick a fight with the United States, the U.K. or Israel.

QUESTIONER: I was wondering, do you have any thoughts on, or are you optimistic about the potential for H.R. McMaster serving on the National Security Council?

JOHN BELLINGER: I think a lot of us were hopeful that he really will be a very good and successful national security advisor. I don't know him. He's faces a lot of challenges though. He does not seem to be as ideological as General Flynn. A problem which I do think is a serious disadvantage is that he has no NSC experience. He has not served on the NSC, he has not represented his department with respect to the NSC. I have seen through years of NSC meetings, both when I was an NSC staffer and then representing the State Department at NSC meetings, the NSC process works best when people have NSC experience. And part of it is these jobs are so hard, that you've got, 14, 16, 18, 20 hours a day of meetings and decisions, and unless people are playing very nicely together, and you've essentially seen what works, what doesn't, when you speak, when you shouldn't speak, the process is just not going to work well. And since he's never participated in it before, it just makes it more difficult for him. Both Secretary Rice, and Steve Hadley, whom I've worked for, served on previous NSC staffs. And that has been when the process works best.

So, I hope that General McMaster will actually recruit some more people onto the NSC staff with experience.

And then of course no matter how good he is or how good the staff is, will the President and the others in the White House listen to him and give him the latitude that he needs to be the National Security Advisor and the manager of the process. Or will there be a number of competing power centers inside the White House, that include not only Steve Bannon, but also some of the Trump family members. So, he's got a difficult job.

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Obviously General McMaster can't change his lack of National Security Council experience, so one of the first things that I'll be watching for in just the next two weeks will be, will he choose a different deputy national security advisor, or an additional deputy national security advisor, or will he bring in new people to be the senior directors for each of the geographic directorates, and will he bring in more people who don't just have military experience? Will he try to bring in more people with State Department experience or from some of the other agencies? So if we see some of those announcements of a strong new deputy who personally has got a lot of inter-agency experience, and senior directors with that experience, I think that would be a good sign.