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## Forward: Presidential Power and Foreign Affairs

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# FOREWORD: PRESIDENTIAL POWER AND FOREIGN AFFAIRS

*Michael P. Scharf*<sup>\*</sup>  
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## I

History records that the 2012 U.S. presidential election was decided by close to a 1% margin in the swing state of Ohio.<sup>1</sup> At the height of the presidential election campaign, in the critical state of Ohio, Case Western Reserve University School of Law hosted a day-long symposium to explore the contemporary debate over the foreign affairs powers of the U.S. president.

While modern presidential elections usually focus on the economy, foreign policy often plays an important part in the outcome. For example, in 1980, President Jimmy Carter's handling of the Iran hostage crisis probably cost him re-election. In 2004, the presidential candidates' approach to terrorism and national security were ranked as top concerns of the electorate.<sup>2</sup> And while foreign affairs was not the uppermost concern on the minds of most voters in the 2012 election, polling did indicate that unease about President Barack Obama's handling of the terrorist attack on the U.S. Consulate in Benghazi, Libya<sup>3</sup> significantly tightened the race in its closing days.<sup>4</sup>

Though presidential candidates often campaign on the economy, presidents tend to quickly turn their attention to foreign policy once in office. This is especially true in recent years, where a closely divided Congress has largely frustrated the president's domestic agenda, but has left the president essentially a free hand to unilaterally shape foreign policy. While President George W. Bush

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† Symposium Editor, *Case Western Journal of International Law*, J.D. (expected 2013).

1. *Ohio Puts Obama over the Top*, UPI, Nov. 6, 2012, [http://www.upi.com/Top\\_News/US/2012/11/06/Ohio-puts-Obama-over-the-top/UPI-59631352263101/](http://www.upi.com/Top_News/US/2012/11/06/Ohio-puts-Obama-over-the-top/UPI-59631352263101/).
2. Uri Friedman, *Did Foreign Policy Matter in the 2012 Election?*, FOREIGN POL'Y, Nov. 7, 2012, [http://blog.foreignpolicy.com/posts/2012/11/07/did\\_foreign\\_policy\\_matter\\_in\\_the\\_2012\\_election](http://blog.foreignpolicy.com/posts/2012/11/07/did_foreign_policy_matter_in_the_2012_election).
3. *How the Benghazi Attack Unfolded*, WALL ST. J., Sept. 21, 2012, <http://online.wsj.com/article/SB10000872396390444620104578008922056244096.html>.
4. Friedman, *supra* note 2.

was criticized for a host of actions he instituted without congressional authorization in the “war on terror,” *Foreign Policy* magazine has pointed out that by going to war against Libya without congressional authorization and exponentially expanding the use of drone strikes throughout the globe, “Obama is bringing America closer to the imperial presidency than Bush ever did.”<sup>5</sup>

With these concerns as backdrop, and the election just around the corner, September 2012 seemed like a propitious time for a major conference titled “Presidential Power and Foreign Affairs,” though the issues addressed will have continuing relevance for many years to come. The symposium was funded by a grant from the Wolf Family Foundation, organized by Case Western Reserve’s Frederick K. Cox International Law Center, and co-sponsored by the International Association of Penal Law (American National Section), the American Society of International Law, the International Law Association (American Branch), and the Public International Law and Policy Group.

The Symposium began with a Keynote Speech by Harvard Law Professor Jack Goldsmith, who had been Assistant Attorney General in charge of the Department of Justice Office of Legal Counsel. Symposium panels, featuring two dozen leading experts from government, international organizations, private practice, non-governmental organizations, and academia, focused on “Presidential Power in a War without End,” “The War Powers Resolution at 40,” “Rendition and Targeted Killings of Americans,” “The President’s Power to Manage International Economic Affairs,” and “The President’s Power to Implement International Law after *Medellín v. Texas*.” The Conference ended with a debate between the foreign policy advisers of the two presidential campaigns, moderated by American Society of International Law Executive Director Elizabeth Anderson, focusing on differences in how the two candidates would approach the foreign affairs powers of the president.

The archived webcast of the Symposium is available for viewing anytime at <http://law.case.edu/centers/cox/webcast.asp?dt=20120907>. In addition, panelists Jack Goldsmith, Mike Newton (Vanderbilt), Milena Sterio (CSU), and Bahar Azmy (Legal Director of the Center for Constitutional Rights) appeared as guests on “Talking Foreign Policy,” the Public Radio show that I produce and host on WCPN 90.3 FM Ideastream. The archived broadcast is available at <http://law.case.edu/TalkingForeignPolicy>.

This symposium issue of the *Case Western Reserve Journal of International Law* contains twenty-two articles generated from the

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5. Bruce Ackerman, *Obama’s Unconstitutional War*, FOREIGN POL’Y, Mar. 24, 2011, [http://www.foreignpolicy.com/articles/2011/03/24/obama\\_s\\_unconstitutional\\_war](http://www.foreignpolicy.com/articles/2011/03/24/obama_s_unconstitutional_war).

“Presidential Power and Foreign Affairs” symposium, followed by the text of the annual Cox Center Humanitarian Award Lecture delivered by the Mrs. Fatou Bensouda, entitled *Reflections from the International Criminal Court Prosecutor*. The symposium issue also includes three student Notes related to the topic of the symposium.

## II

This symposium issue opens with a commentary by the conference’s keynote speaker, Jack Goldsmith, whose article, *Power and Constraint: The Accountable Presidency After 9/11*,<sup>6</sup> asserts that, in fact, little was at stake in the 2012 election with respect to presidential power in the area of foreign affairs and national security. Professor Goldsmith does not argue that the country’s foreign policy will remain static, but rather that regardless of who won the presidency, national security policy would continue down the same path that was set by the Bush Administration in the aftermath of 9/11 as modified by Congress, the courts, and the bureaucracy.

The issue continues with a trio of articles addressing the concept of vast presidential power during a “war without end” from different perspectives. The title of this panel was inspired by George Orwell’s dystopian classic, *1984*,<sup>7</sup> where the people of the State of Oceania are told that their country is perpetually at war. The enemy changes from Eurasia to Eastasia, but the war is permanent—its real purpose to control dissent and sustain governmental power. The Legal Director of the Center for Constitutional Rights, Baher Azmy’s article, *An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith’s Power and Constraint*,<sup>8</sup> argues that Goldsmith’s thesis is flawed in large part because he wrongly assumes that the congressional and judicial constraints imposed on the president’s actions in the war on terror have bestowed legitimacy upon those actions. Azmy argues that the constraints have not been sufficient and that the pendulum has not swung far enough back toward protection of due process and civil liberties since 9/11. Former Deputy Assistant Secretary of Defense Sandra L. Hodgkinson’s article, *Executive Power in a War Without End: Goldsmith, the Erosion of Executive Authority on Detention, and the End of the War on*

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6. Jack Goldsmith, *Power and Constraint*, 45 CASE WES. RES. J. INT’L L. 11 (2012).

7. GEORGE ORWELL, 1984 (1934).

8. Baher Azmy, *An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith’s Power and Constraint*, 45 CASE WES. RES. J. INT’L L. 23 (2012).

*Terror*,<sup>9</sup> challenges the premise that the war on al-Qaeda is in fact a war without end, and outlines its likely final stages, leading to release of all detainees held at Guantanamo Bay. The final article, *War Without End? Legal Wrangling Without End*,<sup>10</sup> by George Mason University Law Professor Jeremy Rabkin, argues that Congress and the courts have gone too far in contracting executive authority in the post-9/11 era.

The issue moves on to a group of five articles examining the War Powers Resolution, which was enacted forty years ago but continues to be as controversial as ever today. Laurie R. Blank, Professor at Emory University School of Law, begins in *Presidential Foreign Policy: An Opportunity for International Law Education*,<sup>11</sup> by describing how the War Powers Resolution has had the positive effect of impelling the president to communicate military policy rationales and justifications to the public. Next, Robert F. Turner, Associate Director of the Center for National Security Law at the University of Virginia, argues in *The War Powers Resolution at 40: Still an Unconstitutional, Unnecessary, and Unwise Fraud that Contributed Directly to the 9/11 Attacks*,<sup>12</sup> that the War Powers Resolution has done tremendous harm to U.S. national security and the cause of world peace—including playing a key role in encouraging Osama bin Laden to launch the 9/11 attacks. Gregory Noone, Director of the National Security Law and Intelligence Program at Fairmont State University, in turn argues in *The War Powers Resolution and Public Opinion*<sup>13</sup> that the War Powers Resolution has become a “political cover” for Congress. Professor Noone explains how Congress usually acquiesces to the president’s swift and small scale use of force and only rarely threatens legislative action when the use of force is prolonged and unpopular. The next article, *The War Powers Resolution—A Dim and Fading Legacy*<sup>14</sup> by John Crook, Vice President of the American Society of International Law and former

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9. Sandra L. Hodgkinson, *Executive Power in a War Without End: Goldsmith, the Erosion of Executive Authority on Detention, and the End of the War on Terror*, 45 CASE WES. RES. J. INT’L L. 65 (2012).
  10. Jeremy Rabkin, *War Without End? Legal Wrangling Without End*, 45 CASE WES. RES. J. INT’L L. 81 (2012).
  11. Laurie R. Blank, *Presidential Foreign Policy: An Opportunity for International Law Education*, 45 CASE WES. RES. J. INT’L L. 101 (2012).
  12. Robert F. Turner, *The War Powers Resolution at 40: Still an Unconstitutional, Unnecessary, and Unwise Fraud that Contributed Directly to the 9/11 Attacks*, 45 CASE WES. RES. J. INT’L L. 109 (2012).
  13. Gregory Noone, *The War Powers Resolution and Public Opinion*, 45 CASE WES. RES. J. INT’L L. 145 (2012).
  14. John R. Crook, *The War Powers Resolution—A Dim and Fading Legacy*, 45 CASE WES. RES. J. INT’L L. 157 (2012).

Assistant Legal Adviser at the U.S. Department of State, argues that the War Powers Resolution has actually had very little impact over the past forty years and will likely have even less impact in the future. This section concludes with Michael Newton's article *Inadvertent Implications of the War Powers Resolution*.<sup>15</sup> Newton, a Professor at Vanderbilt University School of Law and former Deputy to the Ambassador-at-Large for War Crimes Issues, writes that the War Powers Resolution has perversely encouraged presidents to embrace military strategies designed to avoid application of the War Powers Resolution rather than to best fulfill strategic objectives.

The issue's next set of articles address targeted killings and use of Predator drones. In *The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings Under International Law*,<sup>16</sup> Milena Sterio, Professor at Cleveland State University Marshall College of Law, explains the legal issues and problems associated with having the CIA, as opposed to the Department of Defense, operate the drone program. She concludes that a military-led drone operation would better ensure that the rule of law guides the use of force. Next, in *America's Drone Wars*,<sup>17</sup> Professor Leila Nadya Sadat, Director of the Whitney Harris World Law Institute at Washington University School of Law, examines the legal and ethical questions of using drones. She concludes that targeted killings outside of areas of active hostilities violate international law; but even in areas of active hostilities drone killings may still violate intentional law if they violate proportionality or threaten civilians. Building on that theme, in *Targeted Killing: When Proportionality Gets All Out of Proportion*,<sup>18</sup> Professor Amos N. Guiora of University of Utah argues that targeted killings need to be subject to more rigorous standards, criteria, and guidelines, and advocates judicial oversight by a specialized court. This section concludes with *Rightly Dividing the Domestic Jihadist from the Enemy Combatant in the "War Against al-Qaeda"—Why It Matters in Rendition and Targeted Killings*,<sup>19</sup> by

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15. Michael A. Newton, *Inadvertent Implications of the War Powers Resolution*, 45 CASE WES. RES. J. INT'L L. 173 (2012).
  16. Milena Sterio, *The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings Under International Law*, 45 CASE WES. RES. J. INT'L L. 197 (2012).
  17. Leila Nadya Sadat, *America's Drone Wars*, 45 CASE WES. RES. J. INT'L L. 215 (2012).
  18. Amos N. Guiora, *Targeted Killing: When Proportionality Gets All Out of Proportion*, 45 CASE WES. RES. J. INT'L L. 235 (2012).
  19. Jeffrey F. Addicott, *Rightly Dividing the Domestic Jihadist from the Enemy Combatant in the "War Against al-Qaeda"—Why It Matters in Rendition and Targeted Killings*, 45 CASE WES. RES. J. INT'L L. 259 (2012).

Professor Jeffrey F. Addicott, Director of the Center for Terrorism Law at St. Mary's University, which argues that the United States needs to differentiate al-Qaeda from domestic jihadi terrorists to avoid a legal gray area.

The issue's next set of articles address the president's power to manage international economic affairs. Professor Chris Wold of Lewis & Clark Law School, focuses on the growing dangers of the greenhouse effect in *Climate Change, Presidential Power, and Leadership: "We Can't Wait."*<sup>20</sup> Professor Wold urges President Obama to continue to take executive action to reduce greenhouse gas emissions, suggesting that if Congress will not act, the president should use his executive powers to direct executive agencies to impose higher environmental standards. Next Professor David Zaring's article, *The President and International Financial Regulation*,<sup>21</sup> explains the president's lack of power with regard to regulating or influencing international economic relations. Professor Zaring of University of Pennsylvania's Wharton School, suggests the president's influence in this area may increase through a new G-20 initiative to increase political oversight of international financial regulation.

The issue then turns to the president's power to implement international law after *Medellín v. Texas*,<sup>22</sup> a recent case in which the Supreme Court ruled that the president lacked power to order Texas to not execute a person convicted of rape and murder who had not been apprised of his consular rights as required by the Vienna Convention. Assistant Solicitor General of Texas, Kristofer Monson, writes in *Thoughts on Medellín v. Texas*<sup>23</sup> that the Supreme Court properly curtailed the president's powers to implement non-self-executing treaties. In contrast, in *A Tragi-Comedy of Errors Erodes Self-Execution of Treaties: Medellín v. Texas and Beyond*,<sup>24</sup> Professor John Quigley of Ohio State University School of Law argues that the errors in *Medellín v. Texas* are so egregious that the Court's reasoning may be limited or ignored in future cases. Next, Professor Cassandra Burke Robertson of Case Western Reserve University Law School focuses on the shift in power from the president to the states and

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20. Chris Wold, *Climate Change, Presidential Power, and Leadership: "We Can't Wait,"* 45 CASE WES. RES. J. INT'L L. 303 (2012).

21. David Zaring, *The President and International Economic Regulation*, 45 CASE WES. RES. J. INT'L L. 361 (2012).

22. 552 U.S. 491 (2008).

23. Kristofer Monson, *Thoughts on Medellín v. Texas*, 45 CASE WES. RES. J. INT'L L. 389 (2012).

24. John Quigley, *A Tragi-Comedy of Errors Erodes Self-Execution of Treaties: Medellín v. Texas and Beyond*, 45 CASE WES. RES. J. INT'L L. 403 (2012).

Congress in *The Politicization of Judgment Enforcement*.<sup>25</sup> Professor Robertson suggests that by limiting presidential power, the Court leaves application of international law in the United States open to politicization and less coherent policies. This section then concludes by focusing on the courts' broader role with respect to checking executive power in *War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations*<sup>26</sup> by Jonathan Entin, Case Western Reserve University School of Law's Associate Dean for Academic Affairs. Dean Entin notes that procedural and jurisdictional obstacles often prevent courts from resolving the debate over the roles of Congress and the president in war and foreign affairs, and even when ruling against the president, courts have showed considerable deference to the executive's powers in the area of foreign relations.

The symposium issue then examines two case studies of presidential power and international law in crises. The first involves maritime disputes. In *United States Ratification of the Law of the Sea Convention: Securing Our Navigational Future While Managing China's Blue Water Ambitions*,<sup>27</sup> Professor Michael J. Kelly, President, U.S. National Section, of the International Association of Penal Law and Associate Dean of Creighton University School of Law, argues that China's naval growth makes U.S. ratification of the United Nations Convention on the Law of the Sea more crucial than ever. The second involves the crisis in Syria. In *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis*,<sup>28</sup> Paul R. Williams, J. Trevor Ulbrick, and Jonathan Worboys argue that the president may employ low-intensity military operations in accordance with the Responsibility to Protect doctrine when other options have been exhausted.

The Presidential Power and Foreign Affairs section of the Journal closes with a debate between Ambassador Pierre-Richard Prosper and Professor William Burke-White, whose transcript appears in *Comparing the Approaches of the Presidential Candidates*.<sup>29</sup>

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25. Cassandra Burke Robertson, *The Politicization of Judgment Enforcement*, 45 CASE WES. RES. J. INT'L L. 435 (2012).
  26. Jonathan L. Entin, *War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations*, 45 CASE WES. RES. J. INT'L L. 443 (2012).
  27. Michael J. Kelly, *United States Ratification of the Law of the Sea Convention: Securing Our Navigational Future While Managing China's Blue Water Ambitions*, 45 CASE WES. RES. J. INT'L L. 461 (2012).
  28. Paul R. Williams, J. Trevor Ulbrick & Jonathan Worboys, *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis*, 45 CASE WES. RES. J. INT'L L. 473 (2012).
  29. Amb. Pierre-Richard Prosper & William Burke-White, *Comparing the Approaches of the Presidential Candidates*, 45 CASE WES. RES. J. INT'L L. 369 (2012).



Ambassador Prosper, Foreign Policy Adviser to the Campaign of Governor Romney and Professor Burke-White, Deputy Dean, University of Pennsylvania School of Law and former member of the policy planning staff at the U.S. State Department in the Obama Administration, highlight the fundamental differences in Democratic and Republican foreign policy approaches.

The Symposium articles are followed by the Cox Center Humanitarian Award Lecture, delivered by Fatou Bensouda, the newly elected Chief Prosecutor of the International Criminal Court. Her speech, entitled *Reflections from the International Criminal Court Prosecutor*,<sup>30</sup> assesses the challenges and progress made by the International Criminal Court during its ten-year history and previews a new, more cooperative approach, designed to improve the operations of the Court and its relations with countries around the globe.

The issue's final section is comprised of three student notes. Jessica A. Feil's *Cyberwar and Drones: Using New Technologies, From Espionage to Action*<sup>31</sup> draws an analogy to the international law applicable to use of drones in suggesting a framework for regulating use of cyberwar. The *Journal's* Note of the Year, *Lending an 'Invisible Hand' to the Navy: Armed Guards as a Free Market Assistance to Defeating Piracy*<sup>32</sup> by Brittany E. Pizor, examines the pros and cons and ramifications of having armed security guards on merchant vessels in an effort to deter piracy. Finally, Nicholas P. Weiss's *Somebody Else's Problem: How the United States and Canada Violate International Law and Fail to Ensure the Prosecution of War Criminals*,<sup>33</sup> argues that even though the United States and Canada assert they are not safe havens for perpetrators of war crimes and crimes against humanity, these countries have failed to comply with their international law obligations to vigorously prosecute such persons found within their borders.

The articles and notes contained in this special double issue of the *Journal of International Law* were the combined effort and support of many people. We would like to thank all of those who participated in the Presidential Power, Foreign Affairs & the 2012 Election Symposium on September 7, 2012 for their scholarly insights. We

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30. Fatou Bensouda, *Reflections from the International Criminal court Prosecutor*, 45 CASE WES. RES. J. INT'L L. 505 (2012).

31. Jessica A. Feil, *Cyberwar and Drones: Using New Technologies, From Espionage to Action*, 45 CASE WES. RES. J. INT'L L. 513 (2012).

32. Brittany E. Pizor, *Lending an 'Invisible Hand' to the Navy: Armed Guards as a Free Market Assistance to Defeating Piracy*, 45 CASE WES. RES. J. INT'L L. 545 (2012).

33. Nicholas P. Weiss, *Somebody Else's Problem: How the United States and Canada Violate International Law and Fail to Ensure the Prosecution of War Criminals*, 45 CASE WES. RES. J. INT'L L. 581 (2012).

would also like to extend a very special thank you to the Wolf Family Foundation for its support in making the conference possible. Finally, we would like to thank the student editors of the *Journal of International Law* who diligently worked to make this publication possible.