JUDGE SILBERMAN AND INTERNATIONAL LAW: A UNIFIED APPROACH

JOHN YOO*

Judge Laurence Silberman loved ideas. He loved them because he thought most of the good ones were his. The bad ideas must have been those of the other judge for whom I must have clerked. Or so we joked, the Judge and his clerk, over the years as we debated everything from racial preferences (where we had both started out in support but came to consider a mistake) to drug legalization to war powers.

While we came from different ends of the earth and went to school three decades apart, we often thought alike on issues. Our first love was foreign policy and history, but we took to the law to pay the bills. As a Harvard-trained lawyer, Judge Silberman loved the Socratic method, doctrine and legal process, and reasoning from the facts up to theory. He enjoyed watching his Yale-educated clerk spin theories first and hunt for cases to illustrate them. By the end of the year, he had taught me the virtues of the Socratic method. To modify President John F. Kennedy's quip upon receiving a Yale honorary degree, I had the best of both worlds: a Yale degree and a Silberman education.

Judge Silberman particularly enjoyed pointing out places where I gave him insufficient credit for an idea. Upon reading my book, *Point of Attack: Preventive War, International Law, and Global Welfare*, he took all due credit for the central thesis: the U.N Charter system for restricting war had failed and that nations should replace it with a cost-benefit approach.[1] Worse yet, he had found some proof. In a book to which he contributed to commemorate the tenth anniversary of the September 11, 2001, terrorist attacks, Judge Silberman had observed: "A nation's decision to go to war depends on a political cost-benefit calculation–a balancing test if you will."[2] Worst of all, I had edited the book.

Judge Silberman naturally demanded that Oxford University Press add his name as a co-author to *Point of Attack*. I told him that I had lost the e-mail address for my editor there. In my defense, I had proposed a legal regime for starting war–*jus ad bellum*–using cost-benefit regulation as a model in 2004.[3] Strangely, Judge Silberman remained unpersuaded that my earlier law

* John Yoo is the Emanuel S. Heller Professor of Law at the University of California at Berkeley, a nonresident senior fellow at the American Enterprise Institute, and a visiting fellow at the Hoover Institution. He served as a law clerk to Judge Silberman from 1992–1993. The author thanks Justin Folk and Maguire Radosevic for their thorough and timely research assistance.

[1] JOHN YOO, POINT OF ATTACK: PREVENTIVE WAR, INTERNATIONAL LAW, AND GLOBAL WELFARE (2014).

[2] LAURENCE H. SILBERMAN, REFORMING THE INTELLIGENCE COMMUNITY, CONFRONTING TERROR: 9/11 AND THE FUTURE OF AMERICAN NATIONAL SECURITY 77, 83–84 (Dean Reuter & John Yoo eds., 2011).

[3] John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 787 (2004).

journal article must have unconsciously influenced his own thinking. Worse yet, he could not believe that he would have gotten such an idea from abstract theory, rather than his prized approach of slowly examining and comparing the facts, in this case of wars rather than legal disputes. But our teasing also confirmed that we agreed so strongly on foreign affairs that it became difficult to identify who gave whom the idea.

In this piece, I would like to suggest why a cost-benefit approach to the use of force would have appealed to Judge Silberman, to the point that he might indeed have come up with it first (although only I can accept our joint Nobel Prize now). I think that his thought on international law springs from the same source as his deep experience in administrative law. I will then use this opportunity to honor Judge Silberman by extending the approach to interesting questions of public law today.

I. JUDGE SILBERMAN

Judge Silberman will go down in history as one of the most influential American judges never to serve on the Supreme Court. When judges, lawyers, and students read the work of the Roberts Court today, they will see Silberman's profound intellectual influence at work. As a prominent lawyer in the Nixon administration, who rose to become Solicitor of Labor and then Deputy Attorney General in his 30s, he became one of those leading legal thinkers who–along with Antonin Scalia and Robert Bork at the American Enterprise Institute during the wilderness of the Carter years–helped develop a common conservative position on abortion. Silberman, who was pro-choice, believed that *Roe v. Wade*[4] had concocted a constitutional right out of thin air and that the courts should return the question to the states, where Americans could resolve the question through the democratic political process. Their idea that the Constitution could operate on neutral principles that did not take sides on most moral questions, such as abortion, eventually prevailed this year in *Dobbs v. Jackson Women's Whole Health*.[5]

Though he never wrote an opinion on *Roe*,[6] Silberman helped developed a position of judicial restraint that all could share regardless of their view on the policy of abortion. His belief that judges held a limited competence and should exercise their power to strike down democratically-enacted laws sparingly drove much of his thinking. At times this led him to half-hearted support for originalism. "Judges and scholars who advocate original meaning are merely saying that the Constitution did not authorize judges to act as a continuing constitutional convention making new policy choices not made by the Framers," he wrote in a 1990 law journal article.[7] At other times, his commitment to judicial restraint led him to be one of the most forceful proponents of judicial deference to agency interpretation of vague statutes and the regulations made thereby, even if better readings of the law or superior regulations offered themselves.[8]

Nevertheless, Silberman's most noteworthy opinions came when he departed from judicial restraint. In an opinion whose reasoning rose to influence the Supreme Court, Silberman faced

[4] 410 U.S. 113 (1973).
[5] 142 S. Ct. 2228 (2022).
[6] 410 U.S. 113 (1973).
[7] Laurence H. Silberman, Chevron—*The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990).
[8] *Id.*

the question whether the Second Amendment right "to keep and bear arms" protected an individual right to own a handgun.[9] In a case that eventually became *District of Columbia v. Heller*,[10] Judge Silberman wrote for the majority in response to a challenge of a Washington, D.C. law that effectively banned all private firearm possession.[11] Despite the Amendment's preface that "A well regulated Militia, being necessary to the security of a free State,"[12] he rejected the argument that the Second Amendment guaranteed only the authority of the states to maintain a militia.[13] Instead, Silberman concluded that the Bill of Rights implemented a pre-existing natural right of self-defense.[14] "The Amendment acknowledges 'the right ... to keep and bear Arms,' a right that pre-existed the Constitution like 'the freedom of speech'" Judge Silberman wrote,[15] for the majority in *Parker.* "Because the right to arms existed prior to the formation of the new government . . . the Second Amendment only guarantees that the right 'shall not be infringed.'"[16] In *Heller*, a 5-4 majority of the Supreme Court, Justice Scalia writing, adopted exactly this logic: the right to bear arms pre-existed the Second Amendment.[17] Following the same reasoning, the Court applied the Second Amendment to the states two years later in *McDonald v. City of Chicago*,[18] and then made clear last summer, with Justice Thomas writing, that this right included the liberty to carry firearms outside the home.[19] Maybe the Court would have reached these three results even if Silberman had never proposed the idea that the Second Amendment rested upon a natural individual right to possess and use weapons. But that intellectual innovation provided the reasoning upon which conservative judges found a constitutional right not broadly granted in the constitutional text itself.

Another case where Silberman's influence on constitutional law shone most clearly came from the opinion of which he was most proud. In *In re Sealed Case*,[20] which on appeal became *Morrison v. Olson*,[21] Silberman found that Congress's creation of an independent prosecutor violated the separation of powers.[22] According to Silberman, the law ran afoul of the Constitution because it transferred part of the President's authority to "Take Care that the laws be faithfully executed"[23] to an official whom the President could not fire and thus could not control.[24] In a tour de force of textual reading and historical research, informed by his long experience as a governmental official, Silberman concluded: "For no federal government function is it more vital to the protection of individual liberty that ultimately the buck stop with an accountable official—the

[9] Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 554 U.S. 570 (2008).

[10] 554 U.S. 570 (2008).

[11] *Parker*, 478 F.3d at 373.

[12] U.S. CONST. amend. II.

[13] *Parker*, 478 F.3d at 386–88.

[14] *Id.* at 390.

[15] *Id.*at 382.

[16] *Id.*

[17] *Heller*, 554 U.S. at 592.

[18] McDonald v. City of Chicago, Ill., 561 U.S. 742 (2010).

[19] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

[20] In re Sealed Case, 838 F.2d 476 (D.C. Cir. 1988).

[21] Morrison v. Olson, 487 U.S. 654 (1988).

[22] *In re Sealed Case*, 838 F.2d at 478.

[23] U.S. CONST. art. II, § 3.

[24] *Id.* at 504.

President—than in the prosecution of criminal laws."[25] Although Silberman forever remained shocked that a 7-1 majority of the Supreme Court upheld the independent counsel,[26] he took solace that the sole dissenter was his great friend and fellow Nixon DOJ alum, Justice Scalia. He could also take satisfaction that the law's flaws became so widely recognized—once a Democratic President, Bill Clinton, suffered under it—that both Republicans and Democrats agreed to allow the special counsel experiment to expire in 1999.[27]

But most important of all, the force of his reasoning in the independent counsel case survived and now inspires the Roberts Court. The Roberts Court has embarked on a series of decisions attacking the independence of the agencies, culminating in *Seila Law v. CFPB*.[28] In *Seila Law*, the Court struck down the for-cause removal protection for the director of the Consumer Finance Protection Bureau.[29] The Court declared that past decisions upholding the New Deal independent agencies would remain limited to their facts.[30] Presidents and Congresses can no longer experiment with the design of government, but instead must follow the Framers' rigorous tripartite framework: Congress enacts the laws, the President enforces them, and the courts adjudicate disputes that arise under them.[31] The Roberts Court's ongoing battle with the New Deal state can trace its intellectual origins to Silberman's demand that the executive maintain sole control over the enforcement of federal law.

But I think Silberman's true interest fell upon a different field, where he came to play another important role unknown to many in the law. After leaving the Nixon Justice Department, Silberman served as ambassador to Yugoslavia under President Ford. He had already come into contact with national security issues in the Justice Department, where he famously had to review FBI Director J. Edgar Hoover's secret files and oversaw the warrantless national security searches that were the normal practice for the executive branch until passage of the Foreign Intelligence Surveillance Act of 1978. In fact, Silberman testified against FISA on the grounds that it created a faux-judicial warrant proceeding that conflicted with the purpose of foreign intelligence searches to protect the nation's security rather than prosecute criminal suspects.[32] Judge Silberman's concerns would prove prescient in foreseeing the creation of the "wall" between law enforcement and intelligence collection that the 9/11 Commission would correctly identify as one of the defects that allowed the 9/11 plotters to succeed.[33] As a Judge on the FISA Court of Appeals, Silberman would later uphold the Patriot Act's legislative fix to remove the "wall" and allow greater information sharing between law enforcement and intelligence agencies.[34]

---

[25] *In re Sealed Case*, 838 F.2d at 489.

[26] *Morrison*, 487 U.S. 654 (1988).

[27] JACK MASKELL, CONG. RESEARCH SERV., 98-19 A, INDEPENDENT COUNSELS APPOINTED UNDER THE ETHICS IN GOVERNMENT ACT OF 1978, COSTS AND RESULTS OF INVESTIGATIONS 3 (2006).

[28] Seila L. LLC v. Consumer Fin. Prot. Bureau,140 S. Ct. 2183 (2020).

[29] *Id.* at 2187.

[30] *Id.*

[31] *Id.* at 2212.

[32] Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation. of the H. Permanent Select Comm. on Intelligence, 95th Cong. 224 (1978) (statement of Hon. Laurence Silberman).

[33] National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, 78–80 (2004)

[34] *See, e.g.*, In re Sealed Case, 310 F.3d 717, 719–20 (D.C. Cir. 2002).

Silberman's tour as Deputy Attorney General and as Ambassador began his life-long fascination with foreign affairs. Upon his return from Yugoslavia, Silberman wrote a well-known article that argued that the Foreign Service had become too independent from presidential control, so independent in fact that it competed for the loyalty of Secretaries of State. [35]

He served as the lead foreign policy advisor for President Ronald Reagan's 1980 campaign, became a special presidential envoy to the Middle East (along with Donald Rumsfeld), and, in one of his most important public services, co-headed the commission with ex-Senator Chuck Robb that investigated whether the Bush administration had deliberately manipulated the intelligence that led to the Iraq War of 2003. His commission report dispelled the myth that Bush had lied about the grounds for the war and recommended a sweeping structural reform of the intelligence community.[36] For his service in leading the committee, as well as his other career accomplishments, Silberman received the Presidential Medal of Freedom in 2008.[37]

II. INTERNATIONAL LAW

It was for his work on the commission on Iraq Weapons of Mass Destruction that I asked Judge Silberman to contribute a chapter to *Confronting Terror.* In his indomitable fashion, he made clear that the Bush administration had not gone to war on a pretext–instead, it had relied on faulty intelligence that Saddam Hussein was secretly developing nuclear, chemical, and biological weapons. He reported that "it is a grotesquely false charge that President Bush 'lied us into war' by exaggerating our intelligence on Saddam Hussein's WMD."[38] Instead, the commission unanimously agreed, "the intelligence community had badly erred in its formal National Intelligence Estimate (NIE) of 2002.[39] It concluded, to a 90 percent certainty, that Saddam Hussein possessed WMD."[40] The commission also unanimously agreed that "the administration never, in any way, pressured the intelligence community to reach that conclusion."[41] As Silberman put it, the intelligence community was "dead wrong."[42]

Silberman devoted much of his work in the commission report and his 2011 essay for *Confronting Terror* to reforming the intelligence community to reduce the chances of error. But he conceded that such probabilities could not be reduced to zero. He believed that probabilities–not certainties–abounded in foreign policy, even in questions of war. He rejected the popular dichotomy between wars of choice and wars of necessity as "rather simplistic and misleading."[43] He argued that wars that seem like those of necessity, such as World War II, could really be ones of choice–or vice versa. In explaining his view, he wrote:

---

[35] Laurence H. Silberman, *Toward Presidential Control of the State Department,* FOREIGN AFFAIRS, Mar. 1, 1979 [https://perma.cc/R6E5-VDPZ]

[36] Laurence H. Silberman & Charles S. Robb, *Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction* (2005) [https://perma.cc/7JDC-GV48].

[37] Sam Roberts, *Laurence Silberman, Conservative Touchstone on the Bench, Dies at 86*, N.Y. TIMES (Oct. 5, 2022), https://www.nytimes.com/2022/10/05/us/laurence-silberman-dead.html [https://perma.cc/863G-ZPTH].

[38] Silberman & Robb, *supra* note 36, at 78.

[39] *Id.* at 78–79.

[40] *Id.*

[41] *Id.* at 79.

[42] *Id.*

[43] *Id.* at 83.

> Often, when we look in hindsight, a so-called war of choice was inevitable, and therefore can be described as necessary. Or, to put it another way, the choice is often not whether a country goes to war, but when. A nation's decision to go to war depends on a political cost-benefit calculation—a balancing test, if you will. When thinking defensively, a nation must weigh the imminence or likelihood of a threat against the importance of the interest to be protected and how vital it is.[44]

In economic terms, choosing to go to war depends on whether the expected cost of war is outweighed by the expected benefit of the war. The expected benefit equals the probability of winning times the magnitude of victory, just as the value of a lottery ticket is the probability of winning the jackpot times the size of the jackpot. The expected costs of war, which Silberman did not address, include the likely loss in soldiers and resources from fighting the war. This bears obvious similarities to the Learned Hand formula for negligence in torts in deciding whether the expected harm outweighs the costs in preventing the tort.[45]

My 2004 work argued that international law implicitly recognized this cost-benefit approach.[46] Article 51 of the United Nations Charter forbids the use of force except in self-defense or when authorized by the Security Council.[47] But customary international law recognizes that a nation can resort to force in anticipatory self-defense–before an attack is launched–if the enemy attack is "imminent."[48] It made no sense, however, to limit imminence to a temporal concept. I argued that instead imminence meant a probability approaching 100 percent, which would be achieved only by an actual cross-border attack. Such probability, however, should also be measured against the magnitude of destruction of the attack. It seemed to me that if a nuclear attack was in process, the defending nation could take measure involving force earlier in time than it could if dealing with a small incursion onto its territory due to the differences in the magnitude of destruction. President John F. Kennedy's successful blockade of Cuba to prevent the Soviet deployment of nuclear medium-range ballistic missiles illustrated this calculation at work.

While Silberman did not develop his insight further, I had. It seemed to me that the international law system had adopted a criminal law approach; indeed, the rule clearly mirrored the reasonableness test for the domestic use of force by police.[49] Criminal law had adopted a clear rule because it sought to drive violence to zero and to allow exceptions in discrete cases, such as imminent threats to the lives of others. But I argued that war in international affairs is better suited to a standard that judged the reasonableness of a conflict based on the totality of the circumstances. Only a reasonableness standard could accommodate the cost-benefit approach which Judge Silberman and I both believed nations actually employed.

In addition, I thought the criminal law approach should give way to a regulatory system. Rather than attempt to drive the use of force to zero, the international system clearly saw some forms of the use of force as beneficial. In addition to the Cuban Missile Crisis, the world seemed better off from Israel's 1981 attack on Iraq's nuclear program, the U.S. attack on Libya in 1986, the

---

[44] *Id.* at 83–84.

[45] *See* United States v Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

[46] Yoo, *supra* note 3.

[47] U.N. Charter art. 51.

[48] Yoo, *supra* note 3, at 738–41.

[49] *See* Tennessee v. Garner, 471 U.S. 1, 7 (1985).

Gulf War of 1991, and cases of humanitarian intervention in Rwanda and Kosovo. Yet these examples violated the strict prohibition on the use of force except in self-defense. Instead, they seemed built on an analysis where the expected benefit of war outweighed its expected costs. Rather than zero, international law should promote a certain level of armed conflict in the world that would allow the use of force to put an end to even greater threats to global welfare. Although Judge Silberman did not put his insight into these terms, he argued that France and England should have invaded Nazi Germany when Hitler took the Rhineland in 1936.[50] Hitler almost certainly would have fallen from power. Silberman made a similar argument about invading western Germany when Hitler invaded Poland three years later. These are examples of a regulatory uses of force that would have violated the pure rule of self-defense, but would have achieved a far greater good.

III. A UNIFIED APPROACH

It may be puzzling to see a federal judge committed to the proper interpretation and enforcement of federal law so readily disposing of international law. One explanation might be that Judge Silberman and lawyers of his generation had learned to be skeptical of international law. As a positivist, Silberman would have doubted international rules developed in a world without a supranational government to make or enforce legislation. International law's elevation of custom, the lack of democratic lawmaking mechanisms, and the sparse nature of treaty-based law would have made little sense to him.

But I think that such an approach to international law flowed somewhat naturally from Judge Silberman's early roots in the law. Before he moved to the Justice Department in the Nixon years, he had come to Washington, D.C. from Hawaii–where he had enjoyed his first years of law practice–as a labor lawyer.[51] He eventually rose in the field to become the Solicitor of the Labor Department under Secretary George Shultz, who also knew a thing or two about foreign policy.[52] Labor law in the 1930s–50s sat at the cutting edge of public law when Silberman went to law school, much as environmental law moved to the forefront in the 1970s and 1980s, and high-technology law has today.

I could see labor law as involving similar features to the question of war. Labor and management cooperate to produce a good or service; the profits from the sale benefit them both. But labor and management can fight over the distribution of this surplus between them. If they disagree, labor could call a strike or other form of work stoppage that reduces profits or even brings production to a total halt. Similarly, management could fire workers or close the plant, which would destroy labor's gains too. Labor law produced rules that limited the steps that labor and management could undertake in a dispute, but the procedures could take so long that resolution and enforcement of a settlement might come well after labor-management conflict could impose high costs on both parties.

---

[50] Silberman & Robb, *supra* note 36, at 83.

[51] Interview by Paul D. Clement with Laurence H. Silberman, Senior Judge, U.S. Court of Appeals for the D.C. Circuit, in New York, Ny., at 22:28 (May 17, 2017) [Transcript available here: https://www.law.nyu.edu/sites/default/files/Silberman%20Transcript%20Final%20508.pdf, at 22:28].

[52] *Id.* at 27:24.

I am not certain if Silberman thought of labor-management relations in this way. When he brought up the joys of labor law, I confess that my mind began to wander. But looking back upon it, his thinking about a cost-benefit approach to international conflict mirrors the way that labor and management would think about their relations in the workplace. A union, for example, might consider whether the expected benefits of a strike (the gains from winning times the probability that a strike would succeed) outweighed its costs (the losses to out-of-work labor). Management would similarly consider the magnitude of winning times success, versus the costs of a shutdown. Unlike international armed conflict, labor and management would interact under a rule of law developed through democratic means and enforced by courts and the executive branch. But the time and resources required to prevail in court might mean that in its early stages the parties would struggle as if they were nation-states in a world without a supranational government.

I think that if Judge Silberman had applied this line of analysis to armed conflict, he would have ended up with a similar framework to the one I proposed in *Point of Attack*–though neither of us ever thought of connecting armed conflict and labor law. In international affairs, nations have disputes over territory, population, and resources. They could cooperate to resolve those disputes in a way that avoids war. To see why this is so, we can use a rational actor bargaining model in which each side has the expected cost-benefit analysis above on whether to go to war. The main variable will be the probability of prevailing in a conflict, in which one party's odds of winning will be the reverse of the other parties. If an attacker has a 75 percent chance of winning a conflict, for example, the defender must have a 25 percent chance of prevailing–the total must always be 100 percent. The main determinant of that probability will be the factors that go into winning a war, such as military capability, military and political leadership, and national will, among others.

If the parties act rationally, counterintuitively they should never go to war. If nations have full information, they will know their own and their opponent's chances of prevailing. Rather than suffer the deadweight losses from war, they should instead reach a settlement that simply divides the resource or territory along the lines of their probability of winning a conflict. If the attacker and defender each had a 50 percent chance of winning a war, they should rationally divide the contested territory or resource in half in a peaceful agreement. They would both gain while avoiding the unrecoverable losses of war. Or to use our labor setting, if a union and management are evenly matched in their likelihood of prevailing in a strike, they should just divide their share of the profits 50-50 and avoid the loss of profits from a shutdown. I think that Silberman's train of thought on resolving labor-management disputes thus would have led him to think of armed conflict as a form of resolving international disputes.

One last aspect of this comparison that I would have liked to discuss with Judge Silberman, because I know it would have fascinated him, would be the differences produced by the different context of international affairs. One factor that makes bargaining in labor-management relations possible is complete information and enforcement of legal rules and any settlements by government. Government could enhance bargaining by collecting and disseminating information to both labor and management about the other's goals and resources, and by promising to enforce any ultimate contract.

International relations, however, proceeds in a state of anarchy. The lack of government makes it more difficult for nations to gain perfect information on the chances of their opponent to prevail in a conflict. As Judge Silberman found in his work on the Iraq WMD commission, nations go to great troubles to conceal or misrepresent their actual military capabilities.[53] Nations have a strong incentive to bluff so as to win a better settlement than they would receive in an environment with complete information. Further, no supranational government exists to enforce any bargain reached by the parties. Once the settlement alters the balance of power, the incentive to renege will be strong – which may well inhibit an agreement in the first place. A defender, for example, that agrees to give up 75 percent of a disputed territory cannot rely on a treaty alone to prevent the attacker from improving its military capabilities and then attacking again. The defender needs a government to ensure that the nation that is better off from an agreement continues to keep its word rather than take advantage of the benefits gained to re-open the dispute.

I think Judge Silberman would have liked the solution to this problem of bargaining in international affairs. In order for a nation to overcome the lack of government to enforce agreements, it must show it can be trusted to keep its word. International relations theorists suggest that engaging in credible commitments signal a nation as trustworthy. In the ancient world, credible commitments might have included hostages or arranged marriages between ruling families. Today, they might involve permanent bases or stationing of troops, economic integration, or domestic political arrangements. Repeat these credible commitments and build a record of compliance with treaties, and a nation eventually develops a reputation for trustworthiness.

Judge Silberman would have enjoyed this outcome because he placed a premium in all things on the concept of honor. He published an article, "On Honor," in this Journal in 2009 to urge younger lawyers to revive the ideal in their own government service.[54] He claimed that "the concept of honor appears to have atrophied throughout our society," perhaps because criminal law had come to replace personal morality.[55] "It has almost gotten to the point where people think if their behavior is legal, it cannot be blameworthy." He then described the ways in which government officials could act dishonorably: leaking to the press disagreement with administration policy, rather than either resigning publicly or soldiering on.[56] He finds "blatantly dishonorable" books by government servants that reveal confidences while the administration is still in office.[57] He placed in an even worse category those who attempt to treat with a foreign government to undermine U.S. policy, which in Silberman's view betrayed loyalty to one's country.

Just as individuals could have honor, nations might have honor, too. And that honor would be of great practical use in foreign affairs not for rhetorical purposes, but to enhance a nation's ability to make international agreements. A nation with a reputation for scrupulously fulfilling

[53] *Id.* at 79–80.
[54] Laurence H. Silberman, *On Honor*, 32 HARV. J. L. & PUB. POL'Y 503 (2009).
[55] *Id.* at 503.
[56] *Id.* at 505.
[57] *Id.* at 506.

its promises will find it easier to persuade other nations of its trustworthiness. If it breaks its word, but only for the highest reasons of state, other nations may actually be reassured as well. But nations that gain a reputation for breaking its word, like China's reneging on the agreements made with the United Kingdom on the handover of Hong Kong, will find themselves increasingly isolated and without allies. Judge Silberman, who thought of honor as the most important character trait of all, would have loved to explore its value among nations, too.

CONCLUSION

Judge Silberman had a profound effect in disparate areas: labor law, the separation of powers, and foreign policy and national security. I have sought here to identify a common theme that unified his thought in these three areas. In international affairs, Judge Silberman believed that nations acted only in their self-interest. In separation of powers and administrative law, he argued in favor of deference to executive authority over law enforcement and the agencies. In labor law, I think he was interested in the struggle between unions and management over division of the profits.

What all three have in common is the bargaining that occurs between rational actors in areas with weak institutions. International politics, as Kenneth Waltz famously observed, takes place in a world characterized by anarchy. No supranational government exists that can effectively enforce international law and the decisions of international institutions. Much of the separation of powers also operates in areas where courts either are reluctant or cannot tread. Courts, for example, have had difficulty reviewing presidential decisions to under-enforce the law in order achieve policy outcomes denied by Congress. By the time courts can intervene in strikes or lockouts, unions and management may have destroyed much value for themselves and the economy. In each of these contexts, rational actors would have to balance expected costs against benefits, which requires calculation of the probabilities of future events and yet also an understanding of the psychological as well as tangible values held by the actors.

While guided by such ideas, what perhaps made Judge Silberman stand out was his practical application of them in the real world. He was not only a practicing labor lawyer, but he became the U.S. government's top labor lawyer because he could advise cabinet secretaries on the negotiation of labor disputes. He was not only a top Justice Department official who navigated the nation through the aftermath of Watergate, but he became a federal judge who issued one of the most important opinions on the enforcement of the law. He was not just a lawyer, but also a steady foreign policy advisor who was one of that great generation who helped end the Cold War without firing a shot. In all phases of his remarkable career, he brought to bear a sharp mind, a faith in the Socratic method, and a feistiness in the pursuit of truth that inspired the many who encountered him.