

# FOREWORD

## On American Exceptionalism

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## INTRODUCTION

Since September 11, “American Exceptionalism” has emerged as a dominant leitmotif in today’s headlines. I propose first, to unpack precisely what we mean by American exceptionalism; second, to clarify both the negative and the overlooked positive faces of American exceptionalism; and third, to suggest how we, as American scholars and lawyers, should respond to the most negative aspects of American exceptionalism in the wake of September 11.

By so saying, I directly address the focus of this *Stanford Law Review* Symposium on *Treaties, Enforcement, and U.S. Sovereignty*: whether and when the enforcement of international treaties against the United States affronts U.S. sovereignty. For if one uses “sovereignty” in the modern sense of that term—a nation’s capacity to participate in international affairs<sup>1</sup>—I would argue that the selective internalization of international law into U.S. law need not affront U.S. sovereignty. To the contrary, I would argue, the process of visibly obeying international norms builds U.S. “soft power,” enhances its moral authority, and strengthens U.S. capacity for global leadership in a post-September 11 world.<sup>2</sup>

## I. UNPACKING “AMERICAN EXCEPTIONALISM”

Let me begin with the words of University of Toronto historian Margaret MacMillan:

American exceptionalism has always had two sides: the one eager to set the world to rights, the other ready to turn its back with contempt if its message should be ignored. . . . Faith in their own exceptionalism has sometimes led to a certain obtuseness on the part of Americans, a tendency to preach at other nations rather than listen to them, a tendency as well to assume that American motives are pure where those of others are not . . . .<sup>3</sup>

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1. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995).

[S]overeignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life. . . . In today’s setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system.

*Id.*

2. See JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD’S ONLY SUPERPOWER CAN’T GO IT ALONE* 9 (2002) (“Soft power rests on the ability to set the agenda in a way that shapes the preferences of others. . . . If I can get you to *want* to do what I want, then I do not have to force you to do what you do *not* want to do. If the United States represents values that others want to follow, it will cost us less to lead.”).

3. MARGARET MACMILLAN, *PEACEMAKERS: THE PARIS CONFERENCE OF 1919 AND ITS ATTEMPT TO END WAR* 22 (2001) (describing Woodrow Wilson’s efforts to create a League of Nations).

The event: the Paris Peace Conference of 1919. The President: Woodrow Wilson, obsessed with his Fourteen Points and his ultimately unsuccessful fight to promote United States entry into the League of Nations. The point: When it comes to American exceptionalism, there is really nothing new under the sun. Whether pressing for or against multilateral action, in the twentieth century or the twenty-first, Americans generally tend to strike the world as pushy, preachy, insensitive, self-righteous, and usually, anti-French.

While this "Obtuse American" angle is easy to parrot today, on closer inspection, the reality of American exceptionalism emerges as considerably more multifaceted. Over the centuries, the concept of "American Exceptionalism" has sparked fierce debates in both the academic and political realms.<sup>4</sup> Yet during the last fifteen years, I have had the chance to look at

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4. The term "American Exceptionalism," said to have been coined by Alexis de Tocqueville in 1831, has historically referred to the perception that the United States differs qualitatively from other developed nations, because of its unique origins, national credo, historical evolution, and distinctive political and religious institutions. *See generally* IS AMERICA DIFFERENT?: A NEW LOOK AT AMERICAN EXCEPTIONALISM (Byron E. Shafer ed., 1991); JOHN W. KINGDON, AMERICA THE UNUSUAL (1999); SEYMOUR M. LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD (1996); 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 36-37 (Phillips Bradley ed., Henry Reeve trans., A.A. Knopf 1948) (1835). The phrase sometimes also connotes the notion that America's canonical commitments to liberty, equality, individualism, populism, and laissez-faire somehow exempt it from the historical forces that have led to the corruption of other societies. In American political life, the concept flows through the rhetoric of nearly every American President, from Washington's Farewell Speech, to Lincoln's Gettysburg Address, to Reagan's image of a shining city on the hill, to nearly every post-September 11 speech of George W. Bush. In the academic realm, the phrase has been variously used to explain America's distinctive cultural traditions, *see, e.g.*, DEBORAH L. MADSEN, AMERICAN EXCEPTIONALISM (1998); the evolution of the American Labor movement, *see, e.g.*, JONATHAN A. GLICKSTEIN, AMERICAN EXCEPTIONALISM, AMERICAN ANXIETY: WAGES, COMPETITION, AND DEGRADED LABOR IN THE ANTEBELLUM UNITED STATES (2002); *but see* Sean Wilentz, *Against Exceptionalism: Class Consciousness and the American Labor Movement, 1790-1820*, 26 INT'L LAB. & WORKING CLASS HIST. 1 (1984); America's differences from Europe, *see, e.g.*, ROBERT KAGAN, OF PARADISE AND POWER: AMERICA VS. EUROPE IN THE NEW WORLD ORDER (2003); the failure of socialism in America, *see, e.g.*, SEYMOUR M. LIPSET & GARY MARKS, IT DIDN'T HAPPEN HERE: WHY SOCIALISM FAILED IN THE UNITED STATES (2001); America's peculiar approach to social welfare policy, *see, e.g.*, JACOB S. HACKER, THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES 5-28 (2002); and America's "frontier anxiety," *see, e.g.*, DAVID M. WROBEL, THE END OF AMERICAN EXCEPTIONALISM: FRONTIER ANXIETY FROM THE OLD WEST TO THE NEW DEAL (1996); Frederick Jackson Turner, *The Significance of the Frontier in American History*, in DOES THE FRONTIER EXPERIENCE MAKE AMERICA EXCEPTIONAL? 18 (Richard W. Etulain ed., 1999).

In foreign policy, the notion of American exceptionalism generally "holds that Americans deprecate power politics and old-fashioned diplomacy, mistrust powerful standing armies and entangling peacetime commitments, make moralistic judgments about other people's domestic systems, and believe that liberal values transfer readily to foreign affairs." Joseph Lepgold & Timothy McKeown, *Is American Foreign Policy Exceptional? An Empirical Analysis*, 110 POL. SCI. Q. 369, 369 (1995); Stanley Hoffmann, *The American Style: Our Past and Our Principles*, 46 FOREIGN AFF. 362 (1968).

American exceptionalism from both sides now: not just from the perspective of the academy and the human rights world, but from two very distinct perspectives *within* the human rights arena: on the one hand, as a human rights scholar and nongovernmental advocate; on the other hand, as a U.S. government official. During my five years in the government—half in the Reagan Administration as a Justice Department lawyer and half in the Clinton Administration as Assistant Secretary of State for Democracy, Human Rights, and Labor—I have been asked to wear two hats: to serve as America's plaintiff's lawyer in cases where the United States holds a human rights grievance, as well as its defense lawyer when the United States has been charged with human-rights abuse. Both before and after my time in government, I spent considerable time suing the U.S. government, with regard to its refugee policy, foreign affairs decisionmaking, use of force abroad, and various human rights practices.<sup>5</sup>

From these twin perspectives, I now see, the term "American exceptionalism" has been used far too loosely and without meaningful nuance. When we talk about American exceptionalism, what, precisely, do we mean?

In a penetrating essay, Michael Ignatieff has catalogued various kinds of American exceptionalism, in the process separating out at least three different faces of American engagement with the world:<sup>6</sup> first, what he calls America's *human-rights narcissism*, particularly in its embrace of the First Amendment and its nonembrace of certain rights—such as economic, social, and cultural rights—that are widely accepted throughout the rest of the world. The second face is America's *judicial exceptionalism*, espoused by some Supreme Court Justices, and typified by Justice Scalia's statement in *Stanford v. Kentucky* that the practices of foreign countries are irrelevant to U.S. constitutional interpretation, because, in construing open-ended provisions of the Bill of Rights, "it is *American* conceptions of decency that are dispositive."<sup>7</sup> The third face Ignatieff calls "American exemptionalism"—ways in which the United States actually *exempts itself* from certain international law rules and agreements, even ones that it may have played a critical role in framing, through such techniques as noncompliance; nonratification;<sup>8</sup> ratification with reservations, understandings, and declarations; the non-self-executing treaty

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5. See, e.g., Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139 (1994) (Allen Chair issue) (reviewing litigation); Harold Hongju Koh, *The Haitian Centers Council Case: Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1 (1994).

6. Michael Ignatieff, *American Exceptionalism and Human Rights* (Feb. 12, 2002) (unpublished manuscript, on file with author).

7. 492 U.S. 361, 369 n.1 (1989) (emphasis in original).

8. Ignatieff treats noncompliance and nonratification as separate categories of American exceptionalism, but for present purposes, I also group these phenomena under the "exemptionalism" heading. See Ignatieff, *supra* note 6.

doctrine; or the latest U.S. gambit, unsigning the Rome Statute of the International Criminal Court (ICC).<sup>9</sup>

While this trichotomy is intriguing, I find it both under- and overinclusive. It lumps together certain distinct forms of exceptionalism and misses others. Instead, I prefer to distinguish among four somewhat different faces of American exceptionalism, which I call, in order of ascending opprobrium: distinctive rights, different labels, the “flying buttress” mentality, and double standards. In my view, the fourth face—double standards—presents the most dangerous and destructive form of American exceptionalism.

By distinctiveness, I mean that America has a *distinctive rights culture*, growing out of its peculiar social, political, and economic history. Because of that history, some human rights, such as the norm of nondiscrimination based on race or First Amendment protections for speech and religion, have received far greater emphasis and judicial protection in America than in Europe or Asia. So, for example, the U.S. First Amendment is far more protective than other countries’ laws of hate speech,<sup>10</sup> libel,<sup>11</sup> commercial speech,<sup>12</sup> and publication of national security information.<sup>13</sup> But is this distinctive rights culture, rooted in our American tradition, fundamentally inconsistent with universal human rights values? On examination, I do not find this distinctiveness too deeply unsettling to world order. The judicial doctrine of “margin of appreciation,” familiar in European Union law, permits sufficient national variance as to promote tolerance of some measure of this kind of rights distinctiveness.<sup>14</sup>

Similarly, America’s tendency to use *different labels* to describe synonymous concepts turns out to be more of an annoyance than a philosophical attack on the rest of the world. When I appeared before the Committee Against Torture in Geneva to defend the first United States report on U.S. compliance with the Torture Convention, I was asked the reasonable question why the United States does not “maintain a single, comprehensive collation of statistics regarding incidents of torture and cruel, inhuman or degrading treatment or punishment,” a universally understood concept.<sup>15</sup> My

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9. See Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003).

10. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

11. *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964).

12. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

13. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

14. See generally LOUIS HENKIN, GERALD L. NEUMAN, DIANE F. ORENTLICHER & DAVID W. LEEBRON, *HUMAN RIGHTS* 564 (1999). Admittedly, in a globalizing world, our exceptional free speech tradition can cause problems abroad, as, for example, may occur when hate speech is disseminated over the Internet. In my view, however, our Supreme Court can moderate these conflicts by applying more consistently the transnationalist approach to judicial interpretation discussed *infra* Part III.C.

15. See Harold Hongju Koh, U.S. Assistant Secretary of State, Democracy, Human Rights & Labor, & William R. Yeomans, Chief of Staff, Civil Rights Division, U.S. Dep’t of Justice, Reply to Questions from the U.N. Committee Against Torture 3 (May 11, 2000) (on file with author).

answer, in effect, was that the myriad bureaucracies of the federal government, the fifty states, and the territories *did* gather statistics regarding torture and cruel, inhuman, or degrading treatment, but we called that practice by different labels, including “cruel and unusual punishment,” “police brutality,” “section 1983 actions,” applications of the exclusionary rule, violations of civil rights under color of state law, and the like. Refusing to accept the internationally accepted human rights standard as the American legal term thus reflects a quirky, nonintegrationist feature of our cultural distinctiveness (akin to our continuing use of feet and inches, rather than the metric system). But different labels don’t necessarily mean different rules. Except for some troubling post-September 11 backsliding, the United States generally accepts the prohibition against torture, even if it calls that prohibition by a different name.<sup>16</sup>

Third, I believe that lumping all of America’s exclusionary treaty practices—e.g., nonratification, ratification with reservations, and the non-self-executing treaty doctrine—under the general heading of “American exemptionalism” misses an important point: that not all the ways in which the United States exempts itself from global treaty obligations are equally problematic. For example, although the United States has a notoriously embarrassing record for the late ratification, nonratification, or “Swiss cheese ratification”<sup>17</sup> of various human rights treaties, as my colleague Oona Hathaway has empirically demonstrated, the relevant question is not nonratification but *noncompliance* with the underlying norms, a problem from which the rest of the world tends to suffer more than the United States.<sup>18</sup> Many countries adopt a strategy of ratification without compliance; in contrast, the United States has adopted the perverse practice of human rights *compliance without ratification*. So, for example, during the thirty-seven years after the United States signed, but before it ratified, the Genocide Convention,<sup>19</sup> no one plausibly claimed that U.S. officials were committing genocide. This was simply another glaring example of American compliance without ratification.

This third face of American exceptionalism Louis Henkin long ago dubbed “America’s *flying buttress* mentality.” Why is it, he asked, that in the cathedral of international human rights, the United States is so often seen as a flying buttress, rather than a pillar, willing to stand outside the structure supporting it,

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16. But see Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 45; Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1 (describing potential violations of the Torture Convention occurring in overseas facilities).

17. By “Swiss cheese ratification,” I mean U.S. ratification of multilateral treaties with so many reservations, understandings, and declarations that these conditions substantially limit the U.S. acceptance of these treaties.

18. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1977, 1980 (2002).

19. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (approved by Senate on Feb. 19, 1986).

but unwilling to subject itself to the critical examination and rules of that structure? The short answer is that compliance without ratification gives a false sense of freedom. By supporting and following the rules of the international realm most of the time, but always out of a sense of political prudence rather than legal obligation, the United States tries to have it both ways. On the one hand, it enjoys the appearance of compliance. On the other, it maintains the illusion of unfettered sovereignty. It is a bit like the driver who regularly breaks the speed limit but rarely gets a ticket, because he uses radar detectors, cruise control, ham radios, and similar tricks to stay just this side of the law. He complies, but does not obey, because to obey visibly would mean surrendering his freedom and admitting to constraints, while appearing “free” better serves his self-image than the more sedate label of being law-abiding.<sup>20</sup>

Like “distinctive rights” and “different labels,” the flying buttress mentality is ultimately more America’s problem than the world’s. For example, it is a huge embarrassment that only two nations in the world—the United States and Somalia, which until recently did not have an organized government—have not ratified the Convention on the Rights of the Child. Nevertheless, this ultimately is more America’s loss than that of the world. Why? Because the United States rarely gets enough credit for the large-scale moral and financial support that it actually gives to children’s rights around the world, in no small part because of its promiscuous failure to ratify a convention with which it actually complies in most respects.<sup>21</sup> But once one weighs in the unfavorable alignment of pror ratification votes in the Republican-controlled Senate, and considers the amount of political capital that U.S. activists would require to obtain the sixty-seven votes needed for ratification any time soon, one soon concludes that children’s rights advocates are probably better off directing their limited energies not toward ratification, but rather, toward real strategies to reduce the exploitation of child labor or to expand the prohibitions in the child-soldiers protocol.<sup>22</sup>

This brings me to the fourth and most problematic face of American exceptionalism: when the United States actually uses its exceptional power and wealth to promote a *double standard*. The most problematic case is not distinctive American rights culture, a taste for different labels, or a flying

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20. See Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 626-32 (1998) (describing difference between compliance and obedience).

21. The glaring exception, of course, is article 37(a) of the Children’s Rights Convention, which says that “capital punishment . . . shall [not] be imposed for offences committed by persons below eighteen years of age.” Convention on the Rights of the Child, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, art. 37(a), U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990). But see *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding, by a five-to-four vote, that the Eighth Amendment does not prohibit execution of juvenile offenders who committed their offenses at age sixteen).

22. David M. Smolin, *A Tale of Two Treaties: Furthering Social Justice Through the Redemptive Myths of Childhood* (unpublished manuscript, on file with author).

buttress mentality, but rather, when the United States proposes that a different rule should apply to itself than applies to the rest of the world. Recent well-known examples include such diverse issues as the International Criminal Court,<sup>23</sup> the Kyoto Protocol on Climate Change,<sup>24</sup> executing juvenile offenders or persons with mental disabilities,<sup>25</sup> declining to implement orders of the International Court of Justice with regard to the death penalty,<sup>26</sup> or claiming a Second Amendment exclusion from a proposed global ban on the illicit transfer of small arms and light weapons.<sup>27</sup> In the post-9/11 environment, further examples have proliferated: America's attitudes toward the global justice system, holding Taliban detainees on Guantanamo without Geneva Convention hearings, and asserting a right to use force in preemptive self-defense, about all of which I will say more shortly.

For now, we should recognize at least four problems with double standards. The first is that, when the United States promotes double standards, it invariably ends up not on the higher rung, but on the lower rung with horrid bedfellows—for example, with such countries as Iran, Nigeria, and Saudi

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23. Although the United States initially refused to accede to the Rome Statute of the International Criminal Court, President Clinton signed the treaty on December 31, 2000, without submitting it to the Senate. See *Clinton's Words: "The Right Action,"* N.Y. TIMES, Jan. 1, 2001, at A6. In May 2002, however, the Bush Administration purported to unsign the treaty and notified the United Nations that it did not intend to become a party to the Rome Statute. See Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002), available at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

24. See *Kyoto Protocol to the Framework Convention on Climate Change*, U.N. FCCC, 3d Sess., U.N. Doc. FCCC/CP/1997/7/Add.2 (1997), reprinted in 37 I.L.M. 22 (1998).

25. See *Atkins v. Virginia*, 536 U.S. 304 (2002) (persons with mental retardation); *In re Stanford*, 123 S. Ct. 472 (2002) (Stevens, J., dissenting) (juvenile offenders). See generally Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002) (arguing for internalization of international standards regarding the execution of persons with mental disabilities).

26. In the *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), Germany sued the United States in the World Court for threatening to execute two German nationals without according them rights pursuant to the Vienna Convention on Consular Relations. Although the ICJ issued provisional measures enjoining the execution of Karl LaGrand, American officials ignored the orders, the United States Supreme Court declined to intervene, and LaGrand was executed. The World Court finally found that the United States had violated the Vienna Convention, but, subsequently, American courts have essentially ignored the ICJ's holding. See generally Symposium, *Reflections on the ICJ's LaGrand Decision: Foreword*, 27 YALE J. INT'L L. 423, 424 (2002); Harold Hongju Koh, *Paying Decent Respect to International Tribunal Rulings*, 2002 PROC. AM. SOC'Y OF INT'L L. 45 (discussing post-*LaGrand* U.S. cases).

27. See John R. Bolton, Statement to the Plenary Session of the U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in all its Aspects (July 9, 2001), available at [http://www.un.int/usa/01\\_104.htm](http://www.un.int/usa/01_104.htm) ("The United States will not join consensus on a final document that contains measures abrogating the Constitutional right to bear arms."). For a critique of this argument, see Harold Hongju Koh, *A World Drowning in Guns*, 71 FORDHAM L. REV. 2333 (2003).



Arabia, the only other countries that have not in practice either abolished or declared a moratorium upon the imposition of the death penalty on juvenile offenders.<sup>28</sup> This appearance of hypocrisy undercuts America's ability to pursue an affirmative human rights agenda. Worse yet, by espousing the double standard, the United States often finds itself co-opted into either condoning or defending other countries' human rights abuses, even when it previously criticized them (as has happened, for example, with the United States critique of military tribunals in Peru, Russia's war on Chechen "terrorists," or China's crackdown on Uighur Muslims).<sup>29</sup> Third, the perception that the United States applies one standard to the world and another to itself sharply weakens America's claim to lead globally through moral authority. This diminishes U.S. power to persuade through principle, a critical element of American "soft power." Fourth, and perhaps most important, by opposing the global rules, the United States can end up undermining the legitimacy of the rules themselves, not just modifying them to suit America's purposes. The irony, of course, is that, by doing so, the United States disempowers itself from invoking those rules, at precisely the moment when it needs those rules to serve its own national purposes.<sup>30</sup>

## II. THE OVERLOOKED FACE OF AMERICAN EXCEPTIONALISM

Having focused until now on the negative faces of American exceptionalism, I must address a fifth, much-overlooked dimension in which the United States is genuinely exceptional in international affairs. Looking only at the half-empty part of the glass, I would argue, obscures the most important respect in which the United States has been genuinely exceptional, with regard to international affairs, international law, and promotion of human rights: namely, in its *exceptional global leadership* and activism. To this day, the United States remains the only superpower capable, and at times willing, to commit real resources and make real sacrifices to build, sustain, and drive an international system committed to international law, democracy, and the promotion of human rights. Experience teaches that when the United States leads on human rights, from Nuremberg to Kosovo, other countries follow.

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28. According to Amnesty International, the United States has executed 70% of the juvenile offenders executed worldwide since 1998, and, in 2002, the state of Texas (with three executions) was the only known jurisdiction in the world to execute a juvenile offender. See AMNESTY INT'L, INDECENT AND INTERNATIONALLY ILLEGAL: THE DEATH PENALTY AGAINST CHILD OFFENDERS (abridged ed. 2002), available at [http://www.amnestyusa.org/abolish/reports/amr51\\_144\\_2002.pdf](http://www.amnestyusa.org/abolish/reports/amr51_144_2002.pdf).

29. See, e.g., Tom Malinowski, *Overlooking Chechen Terror*, WASH. POST, Mar. 1, 2003, at A19 (noting that the United States has added three Chechen organizations to the State Department list of terrorist groups, apparently to avoid Moscow's veto of the Iraq resolution before the U.N. Security Council).

30. See, e.g., the discussion of the International Criminal Court and the Security Council, *infra* notes 78-79, 128-29 and accompanying text.

When the United States does not lead, often nothing happens, or worse yet, as in Rwanda and Bosnia, disasters occur because the United States does not get involved.<sup>31</sup>

Let me illustrate with two anecdotes from my own experience. The first comes from my time as Assistant Secretary of State. A young British diplomat I knew came from the British Foreign and Commonwealth Office to work "on detail" at the State Department's Bureau of European Affairs. As he was returning to the British Embassy, I asked him: "So what was the major difference between working at the British Foreign Office and at the U.S. State Department?" His immediate answer, "When something happens in the world, the Americans ask, 'What should we do?' In the British Foreign Office, when something happens in the world, we ask, 'What will the Americans do?'"

This explains in part the Bush Administration's cynicism about the French. Can you remember the last major human rights campaign led by the French? If you cannot remember, it is because in fact, they have led very few, even while notoriously fraternizing with abusive regimes in such countries as China, Iraq, and Burma.

My second, bittersweet anecdote comes from my childhood. It is really the story that made me a human rights lawyer. My late father, Dr. Kwang Lim Koh, served as Minister to the United States for the first democratically elected government in South Korea. In 1961, a military coup overthrew the democratic government of Prime Minister Chang Myon, and Chang was taken into house arrest amid rumors that he would shortly be executed. To plead for Chang's life, my parents brought Chang's teenaged son to see Walt W. Rostow, then the Deputy National Security Adviser to the President. As my father recalled, Rostow turned to the boy, and told him simply, "We know where your father is. Let me assure you, he will not be harmed."<sup>32</sup>

Rostow's words stunned my father, who simply could not believe that any country could have such global power, reach, and interest. The story so impressed my father that he repeated it on countless occasions as I grew up, as proof of the exceptional goodness of American power. But after I entered the State Department, I came to realize that what I had thought had been exceptional behavior is in fact America's diplomatic rule: Every day in

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31. For compelling discussions of how the United States failed to intervene in time in Bosnia and Rwanda, see RICHARD C. HOLBROOKE, *TO END A WAR* (1998); SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2002).

32. Through Walt Rostow's intervention with his brother, Eugene, then Dean of Yale Law School, my parents later received positions teaching East Asian Law and Society at Yale Law School. Recently, the two great Rostow brothers died within three months of one another. See Todd S. Purdum, *Eugene Rostow, 89, Official At State Dept. and Law Dean*, N.Y. TIMES, Nov. 26, 2002, at C19; Todd S. Purdum, *Walt Rostow, Adviser to Kennedy and Johnson, Dies at 86*, N.Y. TIMES, Feb. 15, 2003, at A23. It is through their great humanity—one of countless acts of generosity committed in their lifetimes—that my family and I found our home both in New Haven and at Yale Law School.

virtually every embassy and consulate around the world, American diplomats make similar interventions for and inquiries about political prisoners, opposition politicians, and labor leaders, even in countries that most Americans could not locate on any map. Without question, no other country takes a comparable interest or has comparable influence worldwide. Both America's global interest and its global influence are genuinely exceptional.

Yet ironically, as I grew older, I came to realize that this canonical story was inherently double-edged. On the one hand, it showed that America both has and exercises exceptional power, every day and in every country on the planet. But the real problem in the Korean case was not that the United States did too much, but that it probably did too little.<sup>33</sup> The United States was ready to intervene to save Prime Minister Chang's life, but not to take the additional steps necessary to restore democracy in South Korea. Instead of doing more to effectuate its human rights commitment, for several decades, the United States instead supported a military government committed to political stability through authoritarian rule and economic growth, a story that became all too familiar throughout the Cold War era.

What this taught me is that human rights problems may arise as often when the United States does not exercise its exceptional leadership in human rights, as when it does. If critics of American exceptionalism too often repeat, "America is the problem, America is the problem," they will overlook the occasions where America is not the problem, it is the solution, and if America is not the solution, there will simply be no solution.

To illustrate, let me cite three timely examples: Afghanistan, the Middle East, and North Korea. In Afghanistan, only one year ago, the United States led an extraordinarily swift and successful military campaign to oust the Taliban and restore democracy.<sup>34</sup> Yet the greater challenge has not been winning the war, but securing the peace. In Bosnia, the United States famously "went in heavy" after the Dayton Accords, committing 60,000 NATO peacekeepers, including some 20,000 Americans.<sup>35</sup> But in Afghanistan, the United States has committed less than 500 of fewer than 6,000 NATO peacekeepers to a significantly larger geographic area. The predictable result: While Hamid Karzai nominally acts as president of Afghanistan, outside of Kabul, much of the country remains under the de facto control of warlords and druglords. Karzai's vice president was assassinated and Karzai himself narrowly avoided assassination, necessitating the commitment of a cordon of

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33. For historical accounts of this period in South Korean political life, see SUNGJOO HAN, *THE FAILURE OF DEMOCRACY IN SOUTH KOREA* (1974); GREGORY HENDERSON, *KOREA: THE POLITICS OF THE VORTEX* 177-91 (1968).

34. For a probing analysis, see Stephen Biddle, *Afghanistan and the Future of Warfare*, *FOREIGN AFF.*, Mar.-Apr. 2003, at 31.

35. See Ann Devroy & Dana Priest, *Clinton Aides Debate Size of U.S. Peacekeeping Force for Bosnia*, *WASH. POST.*, Sept. 21, 1995, at A24.

U.S. diplomatic security personnel to ensure his safety.<sup>36</sup> Human rights abuses continue, but under the name of some Northern Alliance leaders whom the United States supported during the war.<sup>37</sup> Yet instead of making the additional financial commitments necessary to secure Afghanistan and promote serious nation-building, the administration initially allocated *zero* dollars in its 2004 budget for Afghan reconstruction, until embarrassed congressional staffers finally wrote in a paltry line item of \$300 million to cover the oversight.<sup>38</sup> So again, the problem in Afghanistan has not been what the United States has done, but what it has not yet done. The United States won the Afghan war, without making the necessary commitments to secure the peace. Nor has the United States done enough to build democracy in a country that has been ravaged by warfare for decades, even as it has moved on to a far more ambitious war and nation-building exercise in Iraq.

A parallel story can be told about the Middle East peace process, which accentuates the contrast between America's military exceptionalism and its relative diplomatic impotence. The success of "Operation Iraqi Freedom" has again reminded the world that no one fights modern wars like Americans can. Yet the magnitude of American hard power in Iraq contrasts with a remarkable decline in diplomatic initiative by the United States in the Middle East over the past two years. From 1973 on, administrations of both political stripes played an activist, mediating role in the Middle East peace process, most notably at the Clinton and Carter Camp David summits, and the Madrid peace process of the first Bush Administration. The working assumption was that the United States was the only country with the power and position to play the role of honest broker in the regional process. The diplomatic mechanism was a special envoy system for the Middle East that engaged in moment-to-moment shuttle diplomacy, ensuring that the highest-ranking officials would work on the Middle East peace process virtually every day.<sup>39</sup> Yet after January 2001, the United States abruptly withdrew from this activist role, discontinued the special

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36. See Carlotta Gall, *Threats and Responses: Karzai's Progress*, N.Y. TIMES, Dec. 25, 2002, at A1.

37. See Dexter Filkins, *The Anxiety of Postwar Afghans*, N.Y. TIMES, Mar. 31, 2002, at D5; Carlotta Gall, *Afghan Leader Swears In 5 Deputies With an Eye to Balance*, N.Y. TIMES, June 28, 2002, at A6 (explaining Hamid Karzai's attempts to negotiate a political alliance with powerful regional-ethnic warlords and Rashid Dostum's ongoing resistance to a centralized Afghan state); Press Release, Human Rights Watch, Anti-Pashtun Violence Widespread In Afghanistan, Human Rights News (Mar. 3, 2002), available at <http://www.hrw.org/press/2002/03/afghanistan0303.htm>. For an account of competing hegemonic influences in postwar Afghanistan, see Michael Ignatieff, *Nation-Building Lite*, N.Y. TIMES, July 28, 2002, at F26.

38. Paul Krugman, *The Martial Plan*, N.Y. TIMES, Feb. 21, 2003, at A27.

39. In the Clinton Administration, that group included President Clinton; Vice-President Gore; Secretary of State Madeleine Albright; National Security Adviser Sandy Berger; U.S. Ambassador to the United Nations Richard Holbrooke; Assistant Secretary for Near Eastern Affairs Martin Indyk; and Dennis Ross, who served as Special Middle East Envoy for both Republican and Democratic Administrations.

envoy system, and disengaged from diplomatic mediation, with consequences akin to removing adult supervision from a playground populated by warring switchblade gangs.

Since then, the situation has dramatically deteriorated. Left in the hands of Ariel Sharon, Yasir Arafat, and parties beyond either of their control, the peace process has crumbled. New, multiple spasms of violence have broken out that have greatly multiplied the challenges of mediation in the Middle East. When the Bush Administration finally reengaged diplomatically, its initiatives proved singularly unsuccessful.<sup>40</sup> And even while now finally committing itself to a new "road map" for negotiations,<sup>41</sup> the United States has engaged in an ambitious military assault on Iraq that threatens to turn much of the Middle East against us and perhaps to disable us from playing the indispensable role of honest broker in a Middle East peace process.<sup>42</sup> So again, the irony: Even as the United States directs exceptional energy toward Iraq, the greater danger is that that effort will undermine our capacity to do enough elsewhere in the Middle East. Exceptional United States leadership in one place may diminish American soft power to mediate the broader Middle East controversy, in which the United States is undeniably the indispensable player.

My third example is North Korea. When I went to Pyongyang, North Korea in November 2000 with then-Secretary of State Madeleine Albright, the United States had chosen an activist option toward North Korea: creating in 1994 an Agreed Framework for multilateral diplomatic engagement and negotiation as its preferred mechanism for alleviating long-term tensions on the peninsula. Under the Agreed Framework, the United States, South Korea, and Japan would all engage diplomatically with North Korea around a coordinated message and negotiating strategy. The Agreed Framework sought to freeze North Korea's plutonium program, including operations at the Yongbyon nuclear reactor. In exchange, the West promised light-water reactors and oil shipments to replace Yongbyon's energy output, and the longer-term goals of U.S. disavowal of hostile intent toward North Korea, help in dismantling North Korean weapons facilities, and eventual expansion of South Korean and Japanese social, cultural, and economic links.

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40. General Anthony Zinni, Vice President Cheney, and Secretary of State Powell all belatedly made unsuccessful visits to the Middle East in the spring of 2002.

41. In March 2003, President Bush finally announced his intent to publish a diplomatic "road map," devised jointly by the United States, the European Union, and Russia, aimed at establishing a Palestinian state within three years. At this writing, the peace talks have finally made some progress, but only because the United States has finally committed itself to direct involvement in negotiating a settlement between Israel and the Palestinians—the exact kind of involvement the Bush Administration had previously criticized when pursued by President Clinton. See Steven R. Weisman, *The Mideast Thicket*, N.Y. TIMES, May 27, 2003, at A1.

42. See, e.g., Ian Fisher, *Free to Protest, Iraqis Complain About the United States*, N.Y. TIMES, Apr. 16, 2003, at A1 ("Protests against the American forces here are rising by the day as Iraqis exercise their new right to complain . . .").

While plainly violated in part by the North, the Agreed Framework still yielded clear benefits. In addition to the freeze at Yongbyon, over the next decade, North Korea reduced its nuclear missile production, placed a moratorium on tests of long-range missiles, admitted that it had kidnapped Japanese citizens in the 1970s and 1980s, and allowed U.S. inspections of a mountain suspected as a site of further nuclear-weapons work.<sup>43</sup> Most important, North Korea engaged in bilateral dialogue with South Korea, under South Korean President Kim Dae Jung's "Sunshine Policy," which brought Kim Dae Jung to Pyongyang for a historic June 2000 North-South summit meeting with North Korean President Kim Jong Il.<sup>44</sup> Bolstered by winning the Nobel Peace Prize, in late 2000, Kim Dae Jung talked of ways to expand the North-South dialogue, even considering holding the semifinal of the 2002 World Cup Soccer Championships in Pyongyang.<sup>45</sup>

The Clinton Administration had left an agreement to stop certain kinds of missile development and proliferation just short of completion. But when U.S. administrations changed, the new administration broke off talks and withdrew from direct engagement with North Korea, over the objections of President Kim Dae Jung and even of former President George H.W. Bush and his key Asia advisers. By his January 2002 State of the Union Address, the younger President Bush had famously labeled North Korea as part of the "Axis of Evil," along with Iraq and Iran. North Korean President Kim Jong Il was faced with the question of how to get U.S. attention back on his own terms.<sup>46</sup> His chosen

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43. As Deputy Secretary of State Richard Armitage acknowledged recently, in testimony before the Senate Foreign Relations Committee,

I think it's quite clear that from 1994 to now, Yongbyon itself did not produce more plutonium, which could be turned into nuclear weapons. And so, there are dozens of nuclear weapons that North Korea doesn't have because of the framework agreement, and we have to acknowledge that, I believe.

*Testimony of Deputy Secretary of State Richard Armitage Before the Senate Foreign Relations Committee on North Korea*, FED. NEWS SERVICE, Feb. 4, 2003.

44. See James T. Laney & Jason T. Shaplen, *How to Deal with North Korea*, FOREIGN AFF., Mar.-Apr. 2003, at 16.

Whether by desire or by necessity, the North finally appeared to be responding to the long-standing concerns of the United States, South Korea, and Japan. Equally important, Pyongyang seemed to have abandoned its policy of playing Washington, Seoul, and Tokyo off one another by addressing the concerns of one while ignoring those of the other two. For the first time, the North was actively (even aggressively) engaging all three capitals simultaneously.

*Id.*

45. Remarkably, the actual semifinal match pitted South Korea against a reunited Germany before a wildly exuberant Korean audience. Had that match been played in Pyongyang, with global media attention, and South Korean and North Korean fans cheering together for the South, it would have had a cultural impact upon North Korea's isolation many times greater than U.S.-Chinese "ping-pong diplomacy" of the 1970s.

46. My personal observation of Kim Jong Il convinces me that however strange, isolated, and maladjusted he may be, he is neither uninformed nor unintelligent. When President Bush suddenly announced in January 2002 that North Korea is part of an "Axis of Evil" with Iraq, when nothing had really changed on the ground, Kim surely concluded that

solution: building more bargaining chips by lifting the freeze at Yongbyon, beginning to enrich plutonium to make nuclear weapons, ousting weapons inspectors, openly cheating on other international agreements, and in January of this year, announcing North Korean withdrawal from the Nuclear Nonproliferation Treaty.

America's "hard power" alternative—disarming North Korea militarily—raises such a threat to the people of South Korea and the 100,000 U.S. troops stationed there as to be effectively unusable. Yet the passive alternative initially chosen by the Bush Administration would have let North Korea go nuclear, while seeking to isolate and contain it in hopes of bringing about the eventual collapse of the North Korean regime. Yet an isolationist approach seems most unlikely to affect what is already the most isolated country on earth. Under intense pressure from Seoul and Tokyo, the administration has now finally shifted back to a diplomatic alternative: to reinstate talks on the condition—rejected by the North—that the North first abandon its effort to develop a highly enriched-uranium program.

Meanwhile, Kim Dae Jung has retired, having made little headway with his Sunshine Policy during the last years of his presidency. Our diplomatic ties with South Korea and its new president, Roh Moo Hyun, have been strained. The North Koreans continue to build nuclear weapons and could have six or seven in a year or two, enough to test, sell, and target Seoul and Tokyo, while still holding three or more weapons in reserve as bargaining chips in case serious talks ever do begin.<sup>47</sup> And President Bush has found himself in precisely the same position as his father in 1989 and President Clinton in 1993, concluding reluctantly that America has no real option but to reengage diplomatically, with soft power, having lost both critical time and valuable ground.

After months of nonengagement, in April 2003, the Bush Administration, aided by Chinese intervention, finally dropped its demand that North Korea dismantle its uranium enrichment program as a precondition for talks. North Korea, in exchange, dropped its insistence on two-way talks and agreed to a

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he needed to shift his own policy to counter the new American hostility. See Paul Krugman, *Games Nations Play*, N.Y. TIMES, Jan. 3, 2003, at A21.

47. James Dao, *Korean Issue Shapes Powell's Asia Agenda*, N.Y. TIMES, Feb. 21, 2003, at A17; Robert J. Einhorn, *Talk Therapy*, N.Y. TIMES, Feb. 12, 2003, at A37; *An Agreed Framework for Dialogue with North Korea: Hearings Before the Senate Comm. on Foreign Relations*, 108th Cong. (2003) (testimony of Ashton B. Carter, Co-Director, Preventive Defense Project, John F. Kennedy School of Government, Harvard University), available at <http://foreign.senate.gov/hearings/CarterTestimony030306.pdf>; see also Jae-Suk Yoo, *N. Korea Says It's Extracting Plutonium from Fuel Rods*, ASSOCIATED PRESS, Apr. 18, 2003 (reporting that North Korea claims it is "successfully reprocessing 8,000 spent fuel rods" in order to extract plutonium for use in nuclear warheads).

tripartite meeting in Beijing with the United States and China.<sup>48</sup> The challenge has now become how the United States can use these talks to create a new, enforceable Agreed Framework: negotiating directly in a multilateral setting with the North Koreans (a setting that should include South Korea and Japan) without rewarding North Korea's bad behavior. In my own judgment, the United States should suggest a standstill on nuclear building and a phaseout of existing North Korean "loose nukes" in exchange for a tougher inspections regime, even while putting more incentives on the table for the North in the form of a U.S. nonaggression pact, sanctions phasedown, food aid, resumed construction of light-water reactors, foreign aid and investment, cultural exchange, and the long-term possibility of political federation.

In each of these cases, my historical account and policy prescription may be controversial, but my broader point should not be. American exceptionalism has both good and bad faces, and we should be acutely aware of both. On the Korean peninsula, in Afghanistan, in the Middle East, the United States cannot disengage, and the world simply cannot afford to let the United States disengage. Rather, the United States must reengage in each of these areas, not with hard power—which has limited resolving power in these delicate diplomatic situations—but with "soft" diplomatic power backed by carrots and sticks. In each of these cases, American passivity is not an acceptable option and has demonstrably made matters worse. By constantly stressing the ways in which America is the problem, single-minded critics of American exceptionalism may perversely encourage dangerous passivity in places where the United States presents the only viable solution to a festering global problem.

As important, in all three cases, the best face of American exceptionalism proves to be the face that promotes the rule of law. In each case, American exceptionalism should be channeled not through blunt military force, but through diplomatic engagement designed to create broader legal frameworks: orderly, reasonable sets of expectations rooted in mutual consent. In each case, the broader goal of American power should be the creation of new, constraining and facilitating legal orders—a democratic constitutional government in Afghanistan; a new domestic and international order among Israel and the Palestinians; and a new set of international legal norms to govern North Korea's behavior. In the end, American exceptionalism succeeds best when it seeks not simply to coerce, but rather, to promote sustainable solutions through the generation of legal process and internalizable legal rules.

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48. See Daniel Cooney, *North Korea Changes Stance on Nuclear Talks*, MIAMI HERALD, Apr. 15, 2003, at A9; Karen DeYoung & Doug Struck, *Beijing's Help Led to Talks: U.S. Cuts Demands on North Korea*, WASH. POST, Apr. 17, 2003, at A1.



### III. RESPONDING TO AMERICAN EXCEPTIONALISM: THE BUSH DOCTRINE AFTER SEPTEMBER 11

#### A. *Four Responses*

Given my analysis thus far, how should we respond to American exceptionalism? In recent months, four distinct approaches have emerged to answering this question, which for thumbnail purposes I call: triumphalism; criticizing the critics; blaming American culture; and my preferred solution, triggering transnational legal process. What do I mean by each of these?

First, triumphalism, or “getting used to it.” A speechwriter to a prominent conservative Senator once said to me, “American exceptionalism is a reality. The rest of the world should get used to it. The world should accept it and the U.S. should trumpet it. In a one-superpower world, American exceptionalism is not just inevitable, it is good.” To me, such a blindered response ignores a simple reality: that triumphalism alone does nothing to address the most negative aspects of American exceptionalism, particularly the growing problem of promoting double standards.

A second counterproductive course is to criticize the critics of American overreaching, and to lay the blame on “the human rights discourse.”<sup>49</sup> Under this view, the human rights era is ending, but human rights advocates fail to recognize that the way that they talk about human rights is dated. The solution, these critics suggest, is to change our rhetoric.<sup>50</sup> Yet I see no need to change America’s human rights rhetoric, which has been remarkably consistent from Wilson to Bush, but rather, to change the way we act upon our rhetoric. As Jonathan Greenberg’s paper for this Symposium points out, over the decades, America’s rhetoric has consistently been human rights-oriented and progressive; what has varied is its willingness to act on this rhetoric in a consistent way that promotes universal values without sacrificing American national interests.<sup>51</sup>

A third possible response, often expressed by European critics, is to locate the causes of American exceptionalism within a deeply rooted American culture of unilateralism and parochialism.<sup>52</sup> But the problem with this response is that it does not acknowledge that every American is not equally well-

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49. Those who have recently asserted some version of this view include Michael Ignatieff, David Rieff, and Christopher Hitchens.

50. Michael Ignatieff, *Is the Human Rights Era Ending?*, N.Y. TIMES, Feb. 5, 2002, at A25.

51. Jonathan D. Greenberg, *Does Power Trump Law?*, 55 STAN. L. REV. 1789 (2003).

52. For a powerful statement of this position, see Jed Rubenfeld, *Unilateralism and Constitutionalism* (unpublished manuscript, on file with author). See also BOWLING FOR COLUMBINE (Dog Eat Dog Films 2002) (seeking cultural explanation for American devotion to guns).

positioned to provoke an incident of American exceptionalism. It should be self-evident that some people are better placed than others. For example, in recent years, Secretary of Defense Donald Rumsfeld, former Chair of the Senate Foreign Relations Committee Jesse Helms, and Supreme Court Justice Antonin Scalia have each, in his own way, prevailed over other participants within their chosen institutional environment who were pressing for less exceptionalist outcomes. As Tino Cuéllar's contribution to this Symposium illustrates, the American discourse of opposition to the International Criminal Court has arisen less from broadly entrenched American cultural beliefs than from the skill and maneuvering of particular well-positioned individuals, who, by serving as key institutional chokepoints, have successfully promoted particular well-publicized acts of American exceptionalism.<sup>53</sup>

Nevertheless, with the onset of the second Gulf War with Iraq in March 2003, one cannot escape the feeling that the phenomenon of American exceptionalism and the debate over it has reached a new watershed.<sup>54</sup> In large measure, this is because an exceptionalist strategy seems to have become America's dominant response to the horrendous terrorist attacks of September 11. As my Yale colleague John Lewis Gaddis has observed, "The post-Cold War era began with the collapse of one structure, the Berlin Wall in November 1989, and that era ended with the collapse of another structure, the World Trade Center on September 11, 2001."<sup>55</sup> Looking back, we can now see that September 11 created a cleft in the age of globalization that began with the fall of the Berlin Wall.

On the one hand, the immediate post-Cold War era now looms as a time of "global optimism," when many commentators were exuberantly optimistic about the constructive possibilities posed by the globalization of transport, commerce, finance, and communications. In the age of global optimism, we marveled at the potential of the growing global network of information, trade, and transportation to create genuinely global solutions to global problems. But then we learned that the same coin has a dark side: that terrorists can exploit that same interconnectedness to turn airplanes into missiles, to use the global financial system to move money across borders, to turn ordinary mail into a delivery system for biological weapons, and to plant viruses into email as a tool for cyberterrorism. Since September 11, we have almost literally left the light and entered the shadows of a new age of global pessimism, in which we have realized with alarm that all of the interdependent dimensions of the age of globalization could be equally turned against us.

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53. Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Antitreaty Discourse*, 55 STAN. L. REV. 1597 (2003).

54. See, e.g., Fareed Zakaria, *The Arrogant Empire*, NEWSWEEK, Mar. 24, 2003, at 18.

55. See John Lewis Gaddis, *And Now This, Lessons from the Old Era for the New One*, in *THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11*, at 1 (Strobe Talbott & Nayan Chanda eds., 2001).

B. *The Emerging Bush Doctrine*

The Bush Administration's response to this startling challenge has not been interstitial, but architectural. The emerging platform of response—the Bush Doctrine, if you will—now has five identifiable elements:

- First, *Achilles and his heel*. September 11 brought upon the United States, like Achilles, a schizophrenic sense of its exceptional power, coupled with its exceptional vulnerability. Never has a superpower seemed so powerful and vulnerable at the same time. Given that we have already suffered some 3,000 civilian casualties in the war against terrorism, the question fundamentally posed by the Bush Doctrine is how best to use our superpower resources to protect our vulnerability?
- The answer given has been *Homeland Security*, in both the defensive and preemptive senses of that term. In the name of preserving American power and forestalling future attack, the United States government has instituted sweeping strategies of domestic security, law enforcement, immigration control, security detention, governmental secrecy and information awareness at home,<sup>56</sup> even while asserting a novel right under international law to forced disarmament of any country that poses a gathering threat, through strategies of preemptive self-defense if necessary.<sup>57</sup>
- Third, the administration has justified this claimed sovereign right under international law by a shift in emphasis in human rights. In 1941, when Franklin Delano Roosevelt summoned the allies to arms against an earlier “Axis of Evil,” he did not simply call America to war. Instead, he painted a positive vision of the world we were trying to make: a postwar world of four fundamental freedoms: freedom of speech, freedom of religion, freedom from want, freedom from fear.<sup>58</sup> Since 1941, U.S. human rights policy in both Democratic and Republican administrations has followed the broad contours of the “Four Freedoms” speech. This framework foreshadowed a postwar human rights construct—eventually embedded in Eleanor Roosevelt’s

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56. See generally; LAWYERS COMM. FOR HUMAN RIGHTS, IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW AND SECURITY SINCE 9/11 ERODE HUMAN RIGHTS AND CIVIL LIBERTIES (2003), available at [http://www.lchr.org/us\\_law/loss/imbalance/powers.pdf](http://www.lchr.org/us_law/loss/imbalance/powers.pdf); LAWYERS COMMITTEE FOR HUMAN RIGHTS, A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11 (2002), available at [http://www.lchr.org/pubs/descriptions/loss\\_report.pdf](http://www.lchr.org/pubs/descriptions/loss_report.pdf).

57. See PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 34 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>; Bill Keller, *The I-Can't-Believe-I'm-a-Hawk Club*, N.Y. TIMES, Feb. 8, 2003, at A17 (noting claim of right of forced disarmament).

58. Franklin Delano Roosevelt, *Eighth Annual Message to Congress* (Jan. 6, 1941), in 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 2855 (Fred L. Israel ed., 1966).

Universal Declaration of Human Rights<sup>59</sup> and subsequent international covenants—that would emphasize comprehensive protection of civil and political rights (freedom of speech and religion), economic, social, and cultural rights (freedom from want), and freedom from gross violations and persecution (e.g., the Refugee Convention, the Genocide Convention, and the Torture Convention). But after September 11, administration officials have reprioritized “*freedom from fear*” as the number one freedom the American people need to preserve. Yet instead of declaring a state of emergency, or announcing broadscale changes in the rules by which the United States had previously accepted and internalized international human rights standards, the administration has opted instead for a two-pronged strategy of creating *extralegal zones*, most prominently the U.S. Naval Base at Guantanamo Bay, Cuba, where scores of security detainees are held without legal recourse, and *extralegal persons*—particularly those detainees labeled “enemy combatants,” who, even if American citizens on American soil, are effectively accorded no recognized legal avenue to assert either substantive or procedural rights.

- Fourth, beginning with Afghanistan and now continuing with Iraq, the administration has asserted a new strategy toward democracy-promotion. From Ronald Reagan’s famous 1982 Westminister speech until September 11, successive administrations had supported the promotion of democracy as a fundamental goal of U.S. foreign policy.<sup>60</sup> President Reagan’s address to the Houses of Parliament called for a broad public-private effort “to foster the infrastructure of democracy—the system of a free press, unions, political parties, universities—which allows a people to choose their own way, their own culture, to reconcile their own differences through peaceful means.”<sup>61</sup> During the Bush-Clinton years, the democracy-promotion strategy developed into a broader aspiration, captured by President

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59. See generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

60. For history, see THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 30-32 (1999); TONY SMITH, *AMERICA’S MISSION: THE UNITED STATES AND THE WORLDWIDE STRUGGLE FOR DEMOCRACY IN THE TWENTIETH CENTURY* (1994); Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293 (2002).

61. President Ronald Reagan, *Promoting Democracy and Peace* (June 8, 1982), available at <http://www.iri.org/reaganspeech.asp>. At that time, Congress approved the National Endowment for Democracy—a government-financed, private nonprofit fund which has continued to this day to make significant grants to business and labor—and effectively gave birth to the two political party institutes that now give support for the development of political parties and electoral processes overseas—the National Democratic Institute, of which former Secretary of State Madeleine Albright is now the chair, and the International Republican Institute, of which Senator John McCain is now the chair.

George Bush's January 29, 1991 State of the Union message, for "a new world order—where diverse nations are drawn together in common cause, to achieve the universal aspirations of mankind: peace and security, freedom and the rule of law."<sup>62</sup> But the consistent theme during these years was "democracy promotion from the bottom up," not imposed from the top down. Since the U.S. invasion of Afghanistan, democracy-promotion efforts have shifted toward *militarily imposed democracy*, characterized by United States led military attack, prolonged occupation, restored opposition leaders and the creation of resource-needy postconflict protectorates.<sup>63</sup> At this writing, a new, four-pronged strategy seems to be emerging: "Hard," militarily imposed democracy promotion in Iraq and Afghanistan; "soft," diplomatic democracy promotion in Palestine; optimistic predictions of "domino democratization" elsewhere in the Middle East; and reduced democracy-promotion efforts elsewhere. But if extended globally, as was done during the Cold War, such a U.S. strategy of making "the world safe through imposed democracy" could soon transform into an unsustainable strategy requiring near-unilateral military interventionism, extended support for client governments and imperial overstretch.<sup>64</sup>

- Fifth and finally, as Strobe Talbott has observed, to implement the various elements of this emerging doctrine, the Bush Administration has opted for "*strategic unilateralism and tactical multilateralism*." By its nature, such a strategy resists enforced obedience with international treaties and institutions as dangerously constraining on U.S. national sovereignty.<sup>65</sup> But as with the "flying buttress"

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62. In his successful campaign for President, Bill Clinton criticized George H.W. Bush, by arguing "[o]ur nation has a higher purpose than to coddle dictators and stand aside from the global movement toward democracies . . . President Bush seems too often to prefer a foreign policy that embraces stability at the expense of freedom." Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2427 n.206 (quoting Governor Bill Clinton, Remarks to the University of Wisconsin Institute of World Affairs (Oct. 1, 1992)).

63. See Chibli Mallat, *Focus on Human Rights Offers Hope of Reconciliation*, TIMES (London), Mar. 29, 2003, at A13.

Welcome to the post-modern war. Even before it started, this war appeared surreal, not least for the idea that the United States and Britain were "liberating Iraq" while refusing to involve any Iraqi in the process of change. . . . Even [hawkish Iraqis] are uneasy about American plans to rule Iraq "directly," echoing a universal rejection in the Arab world of American or British occupation.

*Id.*

64. Even the successful impositions of top-down democracy in Germany and Japan were accomplished after a single conflict, not pursuant to the laborious and expensive "seriatim strategy" that Afghanistan and Iraq may now portend.

65. Talbott argues that, by contrast, the Clinton Administration, in which he served as Deputy Secretary of State, pursued a foreign policy based on strategic multilateralism and tactical unilateralism.

mentality described above, to win the illusion of unfettered sovereignty, the United States surrenders its reputation for being law-abiding. This loss of rectitude diminishes America's moral authority and reduces the soft power American needs to mobilize multilateral responses in a post-September 11 world.

If these are the elements of the emerging Bush Doctrine, what makes it so troubling? *Because such a doctrine makes double standards—the most virulent strain of American exceptionalism—not just the exception, but the rule.* Each element of the emerging Bush Doctrine places the United States in the position of promoting genuine double standards, one for itself, and another for the rest of the world. The exclusive focus on American vulnerability ignores the far greater vulnerability of such countries as, for example, Israel and Turkey (which, being a neighbor of Iraq, surely had more to fear from Saddam Hussein than did the United States, yet still denied American soldiers the right to stage ground operations from Turkish bases). Even while asserting its own right of preemptive self-defense, the United States has properly hesitated to recognize any other country's claim to engage in forced disarmament or preemptive self-defense in the name of homeland security.<sup>66</sup> The technique of creating extralegal "rights-free" zones and individuals under U.S. jurisdiction necessarily erects a double standard *within* American jurisprudence, by separating those places and people to whom America must accord rights from those it may treat effectively as human beings without human rights.

Similarly, the oxymoronic concept of "imposed democracy" authorizes top-down regime change in the name of democracy. Yet the United States has always argued that genuine democracy must flow from the will of the people, not from military occupation.<sup>67</sup> Finally, a policy of strategic unilateralism seems unsustainable in an interdependent world. For over the past two centuries, the United States has become party not just to a few treaties, but to a global network of closely interconnected treaties enmeshed in multiple frameworks of international institutions. Unilateral administration decisions to break or bend one treaty commitment thus rarely end the matter, but more usually trigger vicious cycles of treaty violation. In an interdependent world,

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66. See Mary-Ellen O'Connell, *The Myth of Preemptive Self-Defense* 3 (2002) (stating "the United States as a government has consistently supported the prohibition on such preemptive use of force"), at <http://www.asil.org/taskforce/oconnell.pdf>.

67. See U.S.-Sponsored Resolutions on the "Right to Democracy," C.H.R. Res. 1999/57, U.N. CHR, 55th Sess., U.N. Doc. E/CN.4/RES/1999/57 (1999) (51-0, with two abstentions); C.H.R. Res. 2000/62, U.N. CHR, 56th Sess., U.N. Doc. E/CN.4/RES/2000/62 (2000) (30-17, with six abstentions). In so arguing, the United States explicitly invoked legal scholarship asserting the existence of a right to democratic governance under international law. See, e.g., DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000); Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77 (1988).

the United States simply cannot afford to ignore its treaty obligations while at the same time expecting its treaty partners to help it solve the myriad global problems that extend far beyond any one nation's control: the global AIDS and SARS crises, climate change, international debt, drug smuggling, trade imbalances, currency coordination, and trafficking in human beings, to name just a few. Repeated incidents of American treaty-breaking create the damaging impression of a United States contemptuous of both its treaty obligations and treaty partners. That impression undermines American soft power at the exact moment that the United States is trying to use that soft power to mobilize those same partners to help it solve problems it simply cannot solve alone: most obviously, the war against global terrorism, but also the postwar construction of Iraq, the Middle East crisis, or the renewed nuclear militarization of North Korea.

If the emerging Bush Doctrine takes hold, the United States may well emerge from the post-9/11 era still powerful, but deeply committed to double standards as a means of preserving U.S. hegemony. Promoting standards that apply to others but not to us represents the very antithesis of America's claim, since the end of World War II, to apply *universal* legal and human rights standards. The real danger of the Bush Doctrine is thus that it will turn the United States, which since 1945 has been the major architect and buttress of the global system of international law and human rights, into its major outlier, weakening that system and reducing its capacity to promote universal values and protect American interests. More fundamentally, it raises ghosts of renewed "American exceptionalism" in the most messianic sense of that term. As Louis Hartz recognized nearly half a century ago, "Embodying an absolute moral ethos, 'Americanism,' once it is driven on to the world stage by events, is inspired willy-nilly to reconstruct the very alien things it tries to avoid. . . . An absolute national morality is inspired either to withdraw from 'alien' things or to transform them: it cannot live in comfort constantly by their side."<sup>68</sup>

### C. *Addressing Exceptionalism Through Transnational Legal Process*

Under this argument, the real cost of American exceptionalism comes when U.S. insistence upon double standards (in crude terms, "bad exceptionalism") diminishes or inhibits its capacity to display exceptional leadership in a post-Cold War world ("good exceptionalism"). Given this

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68. LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* 286 (1955); see also Lepgold & McKeown, *supra* note 4, at 369 (observing "America's oft-noted all-or-nothing approach to foreign commitments [and that] the country has a more messianic, erratic style abroad than has been typical of other great powers"). For a compelling argument that the United States can and should promote the development of Islamic democracy, without necessarily resorting to force, see NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* (2003).

diagnosis, what do we do about it? My answer: trigger transnational legal process. As American lawyers, scholars and activists, we should make better use of transnational legal process to press our own government to avoid the most negative and damaging features of American exceptionalism.

What is transnational legal process? While most legal scholars agree that most nations obey most rules of international law most of the time, they disagree dramatically as to why they do so. As I have explained elsewhere, I believe that nations obey international law for a variety of reasons: power, self-interest, liberal theories, communitarian theories, and what I call "legal process" theories.<sup>69</sup> While all of these approaches contribute to compliance with international law, the most overlooked determinant of compliance is what I call "vertical process": when international law norms are internalized into domestic legal systems through a variety of legal, political, and social channels and obeyed as domestic law. In the international realm, as in the domestic realm, most compliance with law comes from *obedience*, or norm-internalization, the process by which domestic legal systems incorporate international rules into domestic law or norms.

Under this view, the key to understanding whether nations will obey international law, I have argued, is *transnational legal process*: the process by which public and private actors—namely, nation states, corporations, international organizations, and nongovernmental organizations—interact in a variety of fora to make, interpret, enforce, and ultimately internalize rules of international law.<sup>70</sup> The key elements of this approach are interaction, interpretation, and internalization. Those seeking to create and embed certain human rights principles into international and domestic law should trigger transnational *interactions*, that generate legal *interpretations*, that can in turn be *internalized* into the domestic law of even resistant nation states.

In my view, "transnational legal process" is not simply an academic explanation of why nations do or do not comply with international law, but, more fundamentally, a bridging exercise between the worlds of international legal theory and practice. My time in government confirmed what I had suspected as a professor—that too often, in the world of policymaking, those with ideas have no influence, while those with influence have no ideas. Decisionmakers react to crises, often without any theory of what they are trying to accomplish, and without time to consult academic literature, which, even

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69. For elaboration of this point, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

70. This argument is presented more fully in HAROLD HONGJU KOH, *WHY NATIONS OBEY: A THEORY OF COMPLIANCE WITH INTERNATIONAL LAW* (forthcoming). The pieces of the argument may be found in Koh, *supra* note 69; Koh, *supra* note 27; Koh, *supra* note 20; Koh, *supra* note 62; Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L. J. 1397 (1999); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347, 2358-75 (1991).



when consulted, turns out to be so abstract and impenetrable that it cannot be applied to the problem at hand. On the other hand, activists too often agitate without a clear strategy regarding what pressure points they are trying to push or why they are trying to push them. Scholars have ideas, but often lack practical understanding of how to make them useful to either decisionmakers or activists.

And so it is with American exceptionalism. Like so many aspects of international relations, this phenomenon has generated a tragic triangle: Decisionmakers promote policy without theory; activists implement tactics without strategy; and scholars generate ideas without influence. If transnational legal process is to bridge this triangle, how can we use that concept to press our government to preserve its capacity for positive exceptionalism by avoiding the most negative features of American exceptionalism?

Let me illustrate my approach with respect to three examples from the September 11 context: first, America and the global justice system; second, the rights of 9/11 detainees; and third, America's use of force in Iraq.

1. *The global justice system.*

First, consider the global justice system. In retrospect, the early post-Cold War years revived and rejuvenated the Nuremberg concept of adjudication of international crimes. That rejuvenation found particular expression during this period of global optimism I have described, from 1989 to 2001. The revival could be seen in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Lockerbie trial, the move to create mixed international-domestic tribunals in Cambodia and Sierra Leone, the Pinochet prosecution in Spain and Chile, and the civil adjudication of international human rights violations in U.S. courts under the Alien Tort Claims Act. From the U.S. perspective, the symbolic high-water mark came on December 31, 2000, when President Clinton signed the International Criminal Court Treaty during his last days in office, a treaty that entered into force in April 2002.<sup>71</sup>

But in the wake of September 11, every one of these hallmarks of the age of optimism about global justice has been placed under stress. With the trial of Slobodan Milosevic, the Yugoslav Tribunal faces its make-or-break case. The Rwanda Tribunal has been singularly unsuccessful,<sup>72</sup> and the Lockerbie result disappointed Western governments. For a time, the United Nations pulled out of the Cambodia tribunal,<sup>73</sup> and the Sierra Leone tribunal has yet to decide any

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71. See *supra* note 23.

72. Victor Peskin, *Rwandan Ghosts*, LEGAL AFF., Sept.-Oct. 2002, at 20.

73. As of March 2003, however, the United Nations and Cambodia reached an new agreement on the establishment of a mixed tribunal. See Seth Mydans, *U.N. and Cambodia Reach an Accord for Khmer Rouge Trial*, N.Y. TIMES, Mar. 18, 2003, at A5.

case. Pinochet was never tried and a follow-on effort to try Chadian dictator Hissene Habre in Senegal stalled. Academic commentators and some judges have started to challenge the rise of human rights litigation in U.S. courts.

With the global justice system teetering, enter the Bush Administration. The new administration faced four options: first, supporting the growth and development of the global justice system; second, constructive engagement with that system, to try selectively to encourage it to develop in a manner that served long-term American accountability interests; third, benign neglect—to leave the system alone to evolve its own way; or fourth, declaring hostility to that system and placing the United States outside of it, in effect adopting a double standard toward global adjudication.

Although Colin Powell initially signaled his preference for benign neglect,<sup>74</sup> the Bush Administration has now opted, with four decisive measures, to pursue a hostile course. First, the United States announced that it would cease funding the Yugoslav and Rwanda tribunals by 2008, but failed to specify clearly that this defunding would be conditioned upon participating countries cooperating fully with those tribunals, thus potentially encouraging defendants to pursue foot-dragging measures that would wait out the tribunals.<sup>75</sup> In effect, this decision gave every defendant currently before the tribunal an incentive to stall until 2008 to avoid getting tried. Second, in May 2002, Under Secretary of State John Bolton sent U.N. Secretary-General Kofi Annan a letter seeking to undo President Clinton's December 2000 signature of the International Criminal Court Treaty.<sup>76</sup> Third, the administration initially vetoed extension of the U.N. law enforcement assistance mission in Bosnia. The United States objected because the Security Council would not grant an indefinite and universal exemption from ICC jurisdiction for all U.S. officials engaged in peacekeeping operations, but ultimately consented to continuation of the mission in exchange for a one-year exemption (the maximum the Security Council could provide under the Rome Statute). Fourth, the much-criticized U.S. proposal to try certain foreign terrorist suspects for war crimes before ad hoc domestic military commissions has signaled a symbolic

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74. *See Statement and Testimony of Secretary of State-Designate Colin L. Powell Before the U.S. Senate Committee on Foreign Relations*, Jan. 17, 2001.

Take note of the fact, though, that once America signs a treaty such as this, we are in some ways expected not to defeat its purpose, intended purpose. And the expectation is that we would ultimately ratify it. But in this case I don't think it likely you'll see this administration send it up for ratification.

*Id.*

75. Paul Richter, *U.S. Calls International Court a Waste*, CHI. TRIB., Mar. 1, 2002, at 6.

76. *See Bolton, supra* note 23. Less than a week after President Clinton first signed the ICC Treaty, Bolton urged its "unsignature." *See John R. Bolton, Unsign That Treaty*, WASH. POST, Jan. 4, 2001, at A21.

decoupling from international criminal adjudication.<sup>77</sup> The military commission proposal de facto “unsigns” our commitment to a global adjudication system by declaring that claims involving international crimes of terrorism should henceforth be heard not in international court, or even in U.S. civilian or military courts, but rather, in ad hoc military commissions under the control of the U.S. military, and set up (most likely) at the U.S. Naval Base in Guantanamo Bay, Cuba.

Each of these decisions ignores two realities. First, for more than half a century, the United States has promoted international criminal adjudication as being in our long-run national interest. This policy has stemmed from a sensible prediction that, on balance, the United States is far more likely to act as a plaintiff than as a defendant before these tribunals, and thus, has much more to gain than to lose from their effective functioning. Bosnia, for example, taught that indictment alone can be a valuable political tool. Although two of the leading architects of ethnic cleansing in Bosnia, Radovan Karadzic and Ratko Mladic, have not yet been brought to trial, their indictment before the International Criminal Tribunal for the former Yugoslavia (ICTY) has effectively removed them from political life, creating space for more moderate political forces to emerge.

Second, in many cases, supporting global adjudication has served U.S. national interests by sparing us from far more costly military interventions. Without the Yugoslav Tribunal, it would have been hard for the United States to avoid sending troops to Belgrade to seize and oust Slobodan Milosevic. It is precisely because we supported global criminal adjudication that the United States is not occupying Belgrade now. The ICTY both helped create the conditions that allowed Milosevic’s removal and served as a tool for his removal from political life. Without the tribunal’s indictment, the Clinton Administration would have faced difficulty isolating Milosevic internationally, and his domestic opposition would have had trouble persuading Serbian voters that Milosevic was weak enough to be worth challenging. Nor is it likely that the Bush Administration, openly disdainful of U.S. involvement in the Balkans, would have maintained pressure on Belgrade but for the clear, independent signal from the tribunal. Absent that pressure, Milosevic might have regained power or retained his freedom, remaining a divisive force threatening Kosovo, Europe’s newest democracy. Instead, his removal was accomplished in a way that advanced democracy, spilled no blood, and reinforced U.S. support for a people working to rid itself of a violent regime.

The second Gulf War has already underscored America’s shortsightedness in rejecting a permanent standing international criminal court. As the war began, both President Bush and Secretary of Defense Rumsfeld announced that high-ranking Iraqi war criminals, including Saddam Hussein, would be

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77. Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT’L L. 337 (2002).

prosecuted. Yet their announcement only raised the obvious question: "Where?"<sup>78</sup> Neither the United States nor Iraq have ratified the ICC, eliminating that as a possible venue. Nor, given the intense misgivings that Security Council permanent members France and Russia expressed about the war, can the United States now easily persuade the Security Council to create an ad hoc tribunal under chapter VII, as it did in spearheading the movements to create international tribunals to try war criminals from the former Yugoslavia and Rwanda.<sup>79</sup> Unlike ad hoc courts, a permanent criminal court cannot be so easily dismissed as dispensing "victor's justice." Moreover, states reluctant to extradite their citizens to national courts will find it far easier to hand suspects over to an ICC that is perceived as politically balanced and not inclined to tailor its procedures for particular defendants. Once again, the United States failed to see that accountability flows best not from American military power, but from using global accountability mechanisms as a modulated instrument of American soft power.

In these circumstances, how could transnational legal process help? In three ways. First, those who support eventual U.S. participation in the ICC can seek to internalize recognition of the legitimacy and usefulness of that court within the relevant community of U.S. officials, legislators, and opinion elites.<sup>80</sup> Supporters should provoke interactions between the United States government and the ICC with an eye toward persuading U.S. officials that the ICC actually serves U.S. interests. Although the United States was neither a member of the League of Nations nor a party to the statute of the Permanent Court of International Justice (PCIJ), an eminent American participated in the drafting of the Permanent Court's statute, Americans regularly nominated candidates to be judges, and four Americans were successively elected as PCIJ

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78. See Press Release, The White House, President Says Saddam Hussein Must Leave Iraq Within 48 Hours (Mar. 17, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html> ("[A]ll Iraqi military and civilian personnel should listen carefully to this warning. In any conflict, your fate will depend on your action. . . . War crimes will be prosecuted. War criminals will be punished. And it will be no defense to say, 'I was just following orders.'"); Secretary Rumsfeld & General Myers, Department of Defense News Briefing (Mar. 20, 2003), available at [http://www.dod.gov/news/Mar2003/t03202003\\_t0320sd.html](http://www.dod.gov/news/Mar2003/t03202003_t0320sd.html).

If Saddam Hussein or his generals issue orders to use weapons of mass destruction, . . . [t]hose who follow orders to commit such crimes will be found and they will be punished. War crimes will be prosecuted, and it will be no excuse to say, "I was just following orders." Any official involved in such crimes will forfeit hope of amnesty or leniency with respect to past actions.

*Id.*

79. Even if the United Nations were to create a tribunal, no U.N. court would be authorized to sentence a war criminal to death, which would likely bring it into conflict with the United States, for reasons discussed below.

80. This is what I elsewhere call "political internalization." See Koh, *supra* note 20, at 642.

judges.<sup>81</sup> Over time, growing familiarity gradually demystified the court's processes and helped to facilitate the United States's eventual participation in the PCIJ's successor tribunal, the International Court of Justice.

The Rome Treaty has now entered into force, eighty-nine countries have ratified it, and an impressive initial complement of eighteen judges has been elected. Given that the ICC is now a *fait accompli*, America's wisest course would be to return to the strategy of constructive engagement: to work with this tribunal to make its functioning more fair. The United States should seek to ensure the selection of able and unbiased prosecutors, to provide their office with resources, and to encourage the court as a whole to develop a balanced, respectable jurisprudence of war crimes and crimes against humanity.<sup>82</sup> By snubbing the ICC, the United States has perversely enhanced the chances that it will take on an anti-American focus, thus turning the administration's hostility toward the Court into a self-fulfilling prophecy.

Second, human rights groups should recognize that the ICC is far more likely to survive if the United States sees it as helpful, rather than hostile, to its foreign policy interests. ICC supporters should therefore seek to identify cases that the new Prosecutor, Luis Moreno Ocampo, could bring before the International Criminal Court as a way of illustrating both the Court's responsibility and its political usefulness: for example, for offenses recently committed in the Congo or Cote d'Ivoire. Similarly, as the war against Iraq proceeds, nongovernmental advocates should identify issues upon which Saddam Hussein or his leading subordinates could be tried if a tribunal were set up to try Iraqi war crimes under chapter VII of the U.N. Charter. As Allison Danner has suggested, by identifying appropriate cases, human rights groups would in effect be suggesting the contours of prosecutorial guidelines that the Prosecutor's office could internalize to preserve independence, enhance public credibility, and constrain discretionary decisions.<sup>83</sup> By winning convictions and obtaining domestic compliance, the prosecutor would also begin the process of internalizing ICC decisions into the domestic law of various target nations, in the same way as European Court of Human Rights rulings have now become deeply internalized into the law of member states.

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81. See MANLEY O. HUDSON, *INTERNATIONAL TRIBUNALS: PAST AND FUTURE* 155-56 (1994); HENRY J. STEINER, DETLEV F. VAGTS & HAROLD HONGJU KOH, *TRANSNATIONAL LEGAL PROBLEMS* 173 (4th ed. 1994).

82. For a description of how the United States and other states have the power to influence the work of the International Criminal Court's prosecutor, see Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 *STAN. L. REV.* 1633 (2003); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 *AM. J. INT'L L.* (forthcoming 2003) [hereinafter Danner, *Enhancing Legitimacy and Accountability*].

83. See Danner, *Enhancing Legitimacy and Accountability*, *supra* note 82.

Third, transnational legal process could be used to erode the force of the novel U.S. tactic of unsigning the Rome Treaty.<sup>84</sup> Under international law, it is unclear what the precise legal force of “unsigning” a previously signed treaty should be. At present, the U.S. letter of unsigning is simply lodged with the U.N. depositary of treaties, along with a notation of President Clinton’s prior signature.<sup>85</sup> Nor is the matter automatically controlled by the administration’s stated desire to reject the ICC. In 1994, for example, the United States attempted to modify its acceptance of the compulsory jurisdiction of the International Court of Justice to avoid a suit by Nicaragua, but the court itself eventually rejected that attempt as legally ineffective and proceeded to judgment against the United States.<sup>86</sup>

As a policy matter, it is by no means clear that governments should be allowed to enter and exit their human rights obligations with equal ease. If that were so, other countries could invoke the U.S. “unsigning” precedent to justify backing out of other international commitments of importance to the United States.<sup>87</sup> In each case, the goal should not be to give these nations an easy way out of their commitments, but to enmesh them within the global treaty system to encourage them to internalize those norms over time. Nor can the United States so forthrightly protest North Korea’s acknowledged violation of the 1994 Agreed Framework, when the United States itself is unsigning solemn commitments it previously made.

Rather than taking America’s unsignature at face value, a transnational legal process approach would recognize that the unsigning actually marks the

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84. For background, see Swaine, *supra* note 9.

85. Under the Vienna Convention on the Law of Treaties, art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), “[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty . . . until it shall have made its intention clear not to become a party to the treaty.” The Bolton letter says “that the United States does not intend to become a party to the [International Criminal Court] Treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty.” Bolton, *supra* note 23. The Bolton letter may absolve the United States of responsibility under the Vienna Convention for post-unsigning steps it may take to oppose the operation of the court. But as I argue in the text, nothing in the Bolton letter bars the United States from future cooperation with the court on a case-by-case basis, cooperation that would effectively repudiate the juridical act of “unsignature” through subsequent state practice.

86. See STEINER ET AL., *supra* note 81, at 182-86. Similarly, many international lawyers and judges have never accepted the legality of the United States’s Connolly Reservation to the ICJ’s jurisdiction. See *Interhandel Case* (Switz. v. U.S.), 1959 I.C.J. 6 (Mar. 21) (separate opinion of Judge Lauterpacht) (Preliminary Objections).

87. Iraq, for example, has signed but not ratified a convention on hostage taking. China and Turkey have signed but not ratified the International Covenant on Civil and Political Rights. Yugoslavia has signed but not ratified the International Convention for the Suppression of the Financing of Terrorism; and Afghanistan has signed but not ratified the Convention on the Elimination of All Forms of Discrimination Against Women.

beginning, not the end, of the United States's relationship with an ongoing International Criminal Court. Henceforth, every act of American cooperation with the court will constitute a *de facto* repudiation of the categorical, but theoretical, act of unsignature. Thus, in a well-chosen case, a state party to the court could request that the United States provide evidence to support an ICC prosecution—as was done, for example, when the United States made classified evidence available to the International Criminal Tribunal for the former Yugoslavia (ICTY) to support the indictment of Slobodan Milosevic. Alternatively, another State could seek to extradite to the ICC a suspect located on U.S. soil. If the United States were to cooperate—as it well might in a case that served U.S. interests—the incident could reduce American exceptionalism, undermine the force of the May 2002 unsigning, and help shift the United States toward a new, more pragmatic long-term policy of cooperating with the court on a case-by-case basis.

## 2. *9/11 detainees.*

A similar transnational legal process strategy is currently being applied with regard to post-September 11 detainees. Three issues are currently driving a wedge between the United States and its allies: first, the U.S. refusal to accord full Geneva Convention rights to Taliban detainees being held on Guantanamo; second, the U.S. insistence upon labeling suspected terrorists as “enemy combatants,” a term which, under international law, does not relieve the United States of its Geneva Convention obligations; and third, the death penalty, which the United States insists on preserving as an option for punishing convicted terrorists. Again, each illustrates a U.S. effort to create a double standard.

Although the United States may want its own exceptional “rights-free zone” on Guantanamo, it surely does not want the Russians to create a similar offshore facility for their Chechen terrorists or the Chinese to erect offshore prisons for their Uighur Muslims. Second, even while the United States has been holding Taliban detainees in the exceptional legal category of “enemy combatants” without Geneva Convention hearings, it has been ferociously protesting the denial of Geneva Convention rights to American prisoners of war captured during the Iraq war. And while the United States has insisted upon preserving the death penalty option for any terrorists it captures, it has joined the European Union and the Council of Europe in encouraging Turkey to forswear execution as an option to punish the captive Kurdish terrorist leader Abdullah Ocalan.

So how to use transnational legal process to mitigate American exceptionalism in these three areas? Human rights advocates are currently litigating all three issues, not just in domestic courts, but simultaneously before

foreign and international arenas. In *Al Odah v. United States*,<sup>88</sup> the D.C. Circuit has already rejected the legal claims of Australian, British, and Kuwaiti detainees on Guantanamo, in a ruling that may yet go to the United States Supreme Court. That decision held, erroneously in my view, that Guantanamo detainees have no procedural avenues to challenge their American captivity, because they are being held outside the United States on territory over which the United States is not sovereign.<sup>89</sup> In so holding, the panel relied heavily on *Johnson v. Eisentrager*, a United States Supreme Court decision rejecting similar rights for German prisoners being held in Germany, after having been taken into custody in China after World War II.<sup>90</sup> Yet what the D.C. Circuit misunderstood is that Guantanamo's location outside the United States does not automatically extinguish the procedural rights of all foreign detainees being held there.<sup>91</sup> As the Second Circuit recognized in the Haitian refugee litigation, detainees being held on Guantanamo are subject to *exclusive U.S. jurisdiction and control*, and thus are subject only to U.S. law.<sup>92</sup> It is of no moment that the Guantanamo detainees are subject to nominal Cuban *sovereignty*, as they clearly will find no legal relief in Cuban courts. The relevant question is whether the United States can subject them to punishment exclusively under

88. 321 F.3d 1134 (D.C. Cir. 2003).

89. *Id.* at 1142.

90. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

91. As Professors Katyal and Tribe have noted,

The [*Eisentrager*] opinion is unclear about which of two rationales justified its holding that no habeas review was permissible: (1) that the petitioners were enemies in a declared war, or (2) that they were imprisoned outside the United States on the basis of conduct committed outside the United States. The Court mentioned both factors and did not get into the tricky business of which was doing the work.

Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1306 n.174 (2002).

92. *Haitian Ctrs. Council v. McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992)

It does not appear to us to be incongruous or overreaching to conclude that the United States Constitution limits the conduct of United States personnel with respect to officially authorized interactions with aliens brought to and detained by such personnel on a land mass exclusively controlled by the United States. . . . We note that, in the present case, applying the fifth amendment would not appear to be either "impracticable" or "anomalous" since the United States has exclusive control over Guantanamo Bay, and given the undisputed applicability of federal criminal laws to incidents that occur there and the apparent familiarity of the governmental personnel at the base with the guarantees of due process, fundamental fairness and humane treatment that this country purports to afford to all persons.

*Id.* (citation omitted). See *Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028, 1041 (E.D.N.Y. 1993)

The U.S. Naval Base at Guantanamo Bay, Cuba, is subject to the exclusive jurisdiction and control of the United States where the criminal and civil laws of the United States apply. The courts have protected the fundamental constitutional rights of noncitizens in other territories subject to exclusive U.S. jurisdiction and control, including the former American Sector of Berlin, the Canal Zone, and the Pacific Trust Territories.

*Id.* (citations omitted). When the Haitian detainees on Guantanamo were ultimately released into the United States in mid-1993, this litigation was settled, and these decisions vacated by party agreement, leaving the Second Circuit (and other courts) free now to reassert this position on similar facts.



U.S. law, yet simultaneously afford them no avenue under that law to object to that punishment, to challenge their nontreatment as prisoners of war, to speak to legal counsel, or even to assert claims of mistaken capture.

To clarify that challenge, human rights lawyers are also litigating the status of Guantanamo detainees in parallel settings: before the Inter-American Human Rights Commission,<sup>93</sup> as well as before the British courts, with regard to a habeas petition brought there by a British citizen detained on Guantanamo.<sup>94</sup> In generating these legal interactions, these advocates are pursuing a three-fold goal: to win in non-U.S. fora different legal interpretations from those being asserted by the Bush Administration and accepted by U.S. courts; to discourage the administration from bringing new detainees from Iraq and elsewhere to Guantanamo; and particularly with respect to prisoners whose countries are close American allies in the Iraq war, to generate enough media and political pressure to promote the release of Guantanamo detainees not by court order, but through diplomatic means.<sup>95</sup> A similar pattern is developing with regard to the status of "enemy combatant." The contours and means of proving that status are currently being litigated by criminal defense attorneys in two cases: before the Southern District of New York and the Second Circuit in the case of Jose Padilla (the so-called "dirty bomber")<sup>96</sup> and before the Fourth Circuit (and potentially the United States Supreme Court), in the case of Yasser Hamdi, a Louisiana-born soldier captured in Afghanistan, brought to Guantanamo, and now being held on U.S. soil in a military brig.<sup>97</sup> Both cases raise two questions: whether the U.S. courts should permit U.S. citizens to be held indefinitely and without counsel on U.S. soil based on ambiguous statutory authority, and whether such citizens can be placed in the essentially rights-free status of "enemy combatant," as distinct from the statuses of "prisoner of war" or "criminal defendant," both of which carry well-recognized procedural rights. Significantly, when Richard Reid, the so-called "sneaker bomber," was sentenced, the federal judge took pains to punish him with full recognition of his procedural rights. The judge

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93. Jess Bravin, *Panel Says U.S. Policy on Detainees in Cuba Breaks International Law*, WALL ST. J., Mar. 14, 2002, at B2; Inter-Am. Comm'n on Human Rights, Request for Precautionary Measures, Detainees in Guantanamo Bay, Cuba (Mar. 12, 2002), available at [http://www.photius.com/rogue\\_nations/guantanamo.html](http://www.photius.com/rogue_nations/guantanamo.html).

94. *Regina ex rel. Abbasi v. Sec'y of State for Foreign & Commonwealth Affairs*, 2002 E.W.C.A. Civ. 1598.

95. Such political objectives are usually the goal of what I have elsewhere called "transnational public law litigation." See Koh, *supra* note 70, at 2368-72.

96. *Padilla ex rel. Newman v. Rumsfeld*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). At this writing, the U.S. government has petitioned for, and the District Court has certified, interlocutory appellate review of District Judge Mukasey's order requiring that Padilla meet with his counsel. See *Padilla ex rel. Newman v. Rumsfeld*, No. 02 Civ. 4445 (MBM) (S.D.N.Y. Apr. 9, 2003), available at <http://news.findlaw.com/hdocs/docs/padilla/padillarums40903opn.pdf>.

97. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

told Reid, "I will not dignify you by calling you an enemy combatant. You are a terrorist. You are a criminal."<sup>98</sup>

A transnational legal process approach would suggest that foreign governments and nongovernmental organizations should seek opinions from recognized interpreters of international humanitarian law interested in the global, rather than the parochial, implications of the "enemy combatant" label. Such interpreters could include the International Committee on the Red Cross, the European Court of Human Rights, or foreign courts. In appropriate cases, the issue could even be raised before U.S. courts of military justice, which have deeply internalized the Geneva Conventions as operating rules and display a strong incentive not to promote legal interpretations that would leave American soldiers abroad without legal protections. In short, to reduce American exceptionalism in this area, as in others, it makes sense to pursue legal interactions that provoke interpretations that promote internalization of universal, rather than unilateralist, interpretations of the Geneva Conventions.

The third area of contest—the availability of the death penalty for terrorism suspects—is currently being litigated in multiple fora as part of a broad international-law assault on the U.S. death penalty.<sup>99</sup> Mexico has brought suit against the United States before the International Court of Justice, challenging the execution of Mexican nationals without consular rights.<sup>100</sup> Last year, in *Atkins v. Virginia*, a majority of the United States Supreme Court finally invalidated the execution of persons with mental retardation under the Eighth Amendment Cruel and Unusual Punishment Clause, taking note of the views of the world community.<sup>101</sup> But this Term, in *In re Stanford*, four Justices voted to apply similar reasoning to invalidate the execution of juvenile offenders, but clearly lacked a fifth vote to abolish current U.S. practice, which still permits the execution of offenders under the age of sixteen.<sup>102</sup> As a political matter, the question has been further complicated by the presence on Guantanamo of a sixteen-year-old Canadian captured on the battlefield in Afghanistan,<sup>103</sup> and the

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98. LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 56, at 68.

99. David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963 (2003).

100. See Marlise Simons, *World Court Tells U.S. to Delay Executing Three*, N.Y. TIMES, Feb. 6, 2003, at A13.

101. *Atkins v. Virginia*, 536 U.S. 304, 316 n.20 (2002).

102. 123 S. Ct. 472 (2002) (Stevens, J., dissenting). In *Stanford*, the defendant who brought *Stanford v. Kentucky*, 492 U.S. 361 (1989), filed a petition for an original writ of habeas corpus before the Supreme Court, arguing that his execution would be unconstitutional because he was under 18 at the time of the offense. Five justices denied that petition, but Justices Stevens, Souter, Ginsburg, and Breyer dissented, saying that they would have granted the writ and invalidated the practice in light of *Atkins v. Virginia*.

103. See Carol Rosenberg, *Canadian-Born Teen Held By U.S. as a Terror Suspect*, MIAMI HERALD, Nov. 2, 2002, at 12A ("Omar Khadr [a Canadian], 16, was captured in July in Khost, Afghanistan, after a four-hour firefight described by U.S. officials as an al Qaeda ambush of an American patrol.").

recent indictment by a Virginia grand jury of John Lee Malvo, a seventeen-year-old juvenile, one of the alleged "D.C. sniper terrorists" as a death-eligible adult defendant.<sup>104</sup>

To reduce U.S. exceptionalism, opponents of the death penalty are likely to pursue channels of both political internalization and judicial internalization. In the World Court case, Mexico's President Vicente Fox will certainly engage directly with the White House political staff as well as with Counsel to the President Alberto Gonzales (a Mexican-American and former Texas appellate judge). To forestall execution of extradited terrorist defendants, European justice ministries will likely seek the support of senior career prosecutors in the Criminal Division of the Justice Department, who would probably value the convictions, leads, and information to be obtained from suspects more than the value of executing any particular suspect.

To address America's judicial exceptionalism, we can apply methods of reducing judicial dissonance, as described in Gerry Neuman's article for this Symposium.<sup>105</sup> But more fundamentally, we must recognize that two distinct approaches have emerged within our own Supreme Court's jurisprudence toward America's role in the world. The first is a "nationalist jurisprudence," exemplified by opinions of Justices Scalia and Thomas, which is characterized by commitments to territoriality, national politics, deference to executive power, and resistance to comity or international law as meaningful constraints on national prerogative.<sup>106</sup> The second and more venerable strand of "transnationalist jurisprudence" began with John Jay and John Marshall, was carried forward by Justice Gray in the *The Paquete Habana* case,<sup>107</sup> and was articulated in the Warren and Burger Courts by Justices Douglas<sup>108</sup> and White<sup>109</sup> and in the numerous opinions of Justice Blackmun.<sup>110</sup> The transnationalist banner is now being carried forward by Justices Stephen Breyer and Ruth Bader Ginsburg. Unlike the nationalist jurisprudence, which for guidance looks backward to territory and sideways toward executive power,

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104. See Maria Glod and Tom Jackman, *Malvo Indicted as an Adult; Teen Sniper Suspect Eligible for Execution*, WASH. POST, Jan. 23, 2003, at B1.

105. Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003).

106. For elaboration of this theme, see Harold Hongju Koh, *International Business Transactions in United States Courts*, 261 RECUEIL DES COURS 226-34 (1996); Harold Hongju Koh, *Justice Blackmun and the World Out There*, 104 YALE L.J. 23, 28-31 (1994); Koh, *Transnational Public Law Litigation*, *supra* note 70.

107. 175 U.S. 677, 700 (1900) ("International law is part of our law . . .").

108. See Harold Hongju Koh, *The Liberal Constitutional Internationalism of Justice Douglas*, in "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 297 (S. Wasby ed., 1990).

109. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 439 (1964) (White, J., dissenting).

110. See Koh, *Justice Blackmun and the World Out There*, *supra* note 106, at 28-31 (collecting cases).

transnational jurisprudence looks forward toward political and economic interdependence and outward toward rules of international law and comity as necessary means to coordinate international system interests and to promote the development of a well-functioning international judicial system.<sup>111</sup> The nationalist/transnationalist debate now consumes much of the recent scholarship on international law in U.S. courts, and indeed, runs through many of the articles in this Symposium.<sup>112</sup> As in other areas of Supreme Court jurisprudence, two swing Justices—Anthony Kennedy and Sandra Day O'Connor—have not yet firmly committed themselves to one side or another of the debate.

Significantly, Chief Justice Rehnquist has announced that “now that constitutional law is solidly grounded in so many [foreign] countries, *it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.*”<sup>113</sup> In addition, nearly every member of the current Court has, at one time or another, looked to foreign or international practice or precedent to illuminate interpretations of the U.S. Constitution.<sup>114</sup> Pending Supreme Court litigation, in such diverse areas

111. See, e.g., *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 555, 567 (1987) (Blackmun, J., concurring in part) (arguing that courts must look beyond U.S. interests to the “mutual interests of all nations in a smoothly functioning international legal regime” and “consider if there is a course that furthers, rather than impedes, the development of an ordered international system”); see also Jenny Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. (forthcoming 2003).

112. Of the authors represented in this Symposium, Curt Bradley, Eric Posner, and Ed Swaine line up roughly on the nationalist side; Gerry Neuman, Judith Resnik, Derek Jinks, Ryan Goodman, Oona Hathaway, David Golove, and I line up on the transnationalist side.

113. The Hon. William H. Rehnquist, *Constitutional Court—Comparative Remarks* (1989), reprinted in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (emphasis added). As the Chief Justice explained:

For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.

*Id.*; see also *Raines v. Byrd*, 521 U.S. 811, 828 (1997) (Rehnquist, C.J.) (noting European law on legislative standing but declining to find it in U.S. constitutional regime); *Washington v. Glucksberg*, 521 U.S. 702, 710, 718 n.16, 785-87 (1997) (Rehnquist, C.J.) (declaring that “in almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide” and noting that “other countries are embroiled in similar debates” concerning physician-assisted suicide, citing Canadian Supreme Court, British House of Lords Select Committee, New Zealand’s Parliament, Australian Senate, and Colombian Constitutional Court).

114. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (citing abortion decisions by West German Constitutional Court and Canadian Supreme Court); *Thompson v. Oklahoma*, 487 U.S. 815, 830, 851 (1988) (Stevens, J.) (finding that execution of juveniles violates norms shared “by

as international business, cyberspace, the death penalty, immigration, gay and lesbian rights, as well as post-9/11 controversies, will most likely determine the future direction of America's judicial exceptionalism.<sup>115</sup>

### 3. *Use of force in Iraq.*

Finally, let me turn to the use of force in Iraq. At the dawn of the post-Cold War era, the international law rules for using force seemed pretty clear: One state could lawfully breach another's territorial sovereignty only if one or more of three conditions obtained: response to aggression, self-defense, or an explicit U.N. Security Council resolution. The 1991 Gulf War epitomized all three: The United States led a coalition authorized by a U.N. Security Council resolution to respond to Saddam Hussein's aggression to come to the defense of Kuwait. But two questions lingered. First, when may force be used in defense of human rights or humanitarian concerns without a Security Council resolution (the doctrine of "humanitarian intervention")? Second, when may force be

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other nations that share our Anglo-American heritage, and by the leading members of the Western European community"); *id.* at 851 (O'Connor, J., concurring) (noting that U.S. had agreed by ratifying Article 68 of the Geneva Convention to set a minimum age of 18 for capital punishment in certain circumstances); *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982) (O'Connor, J.) (noting elimination or restriction of felony murder in England, India, Canada, and a "number of other Commonwealth countries"); *United States v. Stanley*, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part) (relying on Nuremberg Military Tribunals in arguing against nonconsensual medical experimentation on humans); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 381 (1995) (Scalia, J., dissenting) (arguing that Australian, Canadian, and English legislation banning anonymous campaign speech suggest that such bans need not impair democracy); *Zadvydas v. Davis*, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) (stating that particular detention of aliens "accords with international views" and referencing Report of U.N. Working Group on Arbitrary Detention & U.N. High Comm'r for Refugees, *Guidelines on Detention of Asylum-Seekers*); *Glucksberg*, 521 U.S. at 785-87 (Souter, J., concurring) (examining Dutch constitutional practice on physician-assisted suicide); *Holder v. Hall*, 512 U.S. 874, 906 n.14 (1994) (Thomas, J., concurring) (mentioning voting systems of Belgium, Cyprus, Lebanon, New Zealand, West Germany, and Zimbabwe in assessing race consciousness in U.S. voting system); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (finding Court's First Amendment jurisprudence consistent with decisions of European Court of Human Rights and Canadian Supreme Court); *Knight v. Florida*, 528 U.S. 990, 995-98 (Breyer, J., dissenting from denial of certiorari) (finding instructive decisions of Privy Council, Supreme Court of India, Supreme Court of Zimbabwe, European Court of Human Rights, Canadian Supreme Court, and U.N. Human Rights Committee on whether lengthy delay in execution renders it inhumane).

115. In an important case this Term, the Court may consider this question in deciding whether same-sex sodomy laws, which are forbidden throughout Europe, should be invalidated in the United States. See, e.g., Brief Amici Curiae of Mary Robinson, Amnesty International U.S.A., Human Rights Watch, Interights, the Lawyers Committee for Human Rights, and Minnesota Advocates for Human Rights, *Lawrence v. Texas* (U.S. No. 02-102) (arguing that statutes criminalizing same-sex sodomy offend concept of "ordered liberty" in Due Process and Equal Protection Clauses).

used in “preemptive self-defense,” to head off an attack that seems imminent, but has not yet occurred?

For much of the decade after the Gulf War, the United States explored the contours of the humanitarian intervention doctrine: from Somalia, to Bosnia, to Kosovo, to East Timor, to Sierra Leone. But September 11—the most vicious of a series of brutal attacks on civilians—suddenly posed a crisis at the crossroads of humanitarian intervention and preemptive self-defense. When and where, international lawyers asked, could the United States now justify using force collectively, without a Security Council resolution, to minimize human rights abuse against innocent civilians and to prevent future attacks on our citizens and territory? When the post-September 11 Security Council resolutions stopped short of explicitly authorizing military attacks on any particular country, the United States invoked a mixed humanitarian/self-defense rationale to strike back at Afghanistan. Having achieved impressive military success in the Afghanistan phase of the campaign, the Bush Administration increasingly invoked arguments based on preemptive self-defense to put troops into the Philippines, to gear up for its military campaign against Iraq, and to assert, as it did in its national security strategy paper, that it has a customary right of preemptive self-defense to protect itself from threats posed by other countries, most notably Iraq.<sup>116</sup>

Preemptive self-defense arguments cannot clearly distinguish between permitted defensive measures and forbidden assaults.<sup>117</sup> Witness, for example, Israel’s recent sweep into the West Bank, which could similarly be rationalized as preemptive self-defense against future terrorist attacks. Unlike the preemptive-self-defense claim, which knows few limits, the humanitarian/human rights argument at least has the advantage that the United States cannot logically invoke human rights as its justification for force without simultaneously accepting human rights constraints as a measure of the rectitude of its actions.

In January 1991, through an impressive diplomatic effort that led then-Secretary of State James Baker to more than forty nations, the United States

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116. In its national security strategy white paper, issued in September 2002, the White House declared,

To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.

We will always proceed deliberately, weighing the consequences of our actions.

PRESIDENT OF THE UNITED STATES, *supra* note 57, at 15-16.

117. For that reason, the United States had not previously accepted the idea that any country can unilaterally attack another in the name of preemptive self-defense, recognizing that such reasoning could authorize China to attack Taiwan, North Korea to attack South Korea, or many countries in the Middle East to attack Israel. See O’Connell, *supra* note 66.

obtained a U.N. Security Council resolution authorizing member nations to “use all necessary means” after January 15, 1991 to drive Iraq from Kuwait.<sup>118</sup> Soon thereafter, the first President Bush announced his commitment to “a new world order—where diverse nations are drawn together in common cause, to achieve the universal aspirations of mankind: peace and security, freedom and the rule of law.”<sup>119</sup>

This time, the Bush Administration first secured sweeping congressional authorization to use force, then bluffed down the unilateralist path.<sup>120</sup> Pressed principally by Secretary of State Colin Powell and British Prime Minister Tony Blair, however, the United States eventually brought the use of force issue back into the U.N. Security Council framework. With United Nations Security Council Resolution 1441, the United States achieved a significant and unanimous diplomatic success.<sup>121</sup> Resolution 1441: (1) decided that “Iraq has been and remains in material breach of its obligations” through its failure to cooperate with inspectors and its failure to disarm; (2) afforded Iraq “a final opportunity to comply with its disarmament obligations under relevant resolutions” by setting up an enhanced inspection regime and ordering Iraq to submit an accurate and complete declaration of its chemical, biological, and nuclear weapons programs; and (3) “warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.” Seven days after, Iraq reluctantly confirmed its intent to comply with the resolution.

Thereafter ensued a four-month public “trial” of disarmament facts à la the Cuban Missile Crisis. During these months, U.N. inspectors combed through Iraq, even while Iraq was supposedly developing a “currently accurate, full and

118. S.C. Res. 678, U.N. SCOR, 45th Sess., at 28, U.N. Doc. S/RES/678 (1990), reprinted in 29 I.L.M. 1565 (1990).

119. Joel Achenbach, “New World Order”: What’s It Mean Anyway?, WASH. POST, Feb. 2, 1991, at D1.

120. Under the congressional resolution passed on October 10, 2002, the

President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

H.R.J. Res. 114, 107th Cong. (2002) (enacted). The President can say he deems military force necessary and appropriate to defend U.S. national security against a continuing Iraqi threat so long as he certifies to Congress, no later than 48 hours after exercising such authority, that

(1) reliance by the United States on further diplomatic or other peaceful means alone either (A) will not adequately protect the national security of the United States against the continuing threat posed by Iraq or (B) is not likely to lead to enforcement of all relevant United Nations Security Council resolutions regarding Iraq; and that (2) acting pursuant to this joint resolution is consistent with the United States and other countries continuing to take the necessary actions against international terrorist and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, and so long as he continues to obey the War Powers Resolution’s durational and reporting requirements.

*Id.*

121. S.C. Res. 1441, U.N. SCOR, 57th Sess., U.N. Doc. S/Res/1441 (2002).

complete declaration of all aspects of its programmes" to develop chemical, biological, and nuclear weapons and long-range missile programs.<sup>122</sup> Throughout this period, the administration waffled on three points: whether it would seek a second Security Council resolution before using military force; whether its real goal in Iraq was disarmament, regime change, or democracy-promotion; and whether its ultimate rationale for use of force would be breach of past Security Council resolutions, the continuing threat posed by Saddam Hussein to peace and security, preemptive self-defense, or human rights.

At the same time, however, the transnational legal process framework clearly pushed the administration further than it preferred down a U.N. path. First, the President's advisers said they didn't need any new Security Council resolution, but then they got resolution 1441. Then they said they didn't need any inspections, but for four months they pursued inspections. Then they said they didn't need a second resolution, but in March 2003, at Tony Blair's urging, they pursued a second one.

By March 2003, however, the administration was feeling the pinch of its own military timetable, which called for any invasion to begin before late spring. After initial wrangling over the second resolution, President Bush and French President Chirac issued incompatible pronouncements. Chirac announced that the French would veto any resolution calling for force; Bush retorted that the United States would go to war, along with the United Kingdom, whether it secured a second resolution or not. The two announcements unnecessarily created a zero-sum situation in which the only second resolution the United States deemed relevant (one supporting rapid attack) was one that the French were precommitted to veto.<sup>123</sup> By framing the issue this way, the United States also virtually guaranteed its own inability to secure the nine votes necessary to pass a second resolution in the absence of a veto. For even close U.S. allies, such as Mexico and Chile, were not willing to subject their citizens to a controversial vote for war, when both the United States and the French had made it clear that that vote would not matter.

Diplomatic historians will long revisit the missed steps that led to the messy start of the second Gulf War. My view is that a transnational legal process solution—the exercise of multilateral coercive power, led by the United States through the U.N. mechanism—was available, but tragically bungled.

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122. Because resolution 1441 made clear that "[f]alse statements or omissions in the declarations submitted by Iraq . . . will constitute a further material breach of Iraq's obligations," *id.* (emphasis added), the Bush Administration read the resolution to require the Iraqis to "Lead and Make Available," i.e., not only to grant U.N. inspectors access, but actually to lead inspectors to sites and make available scientists knowledgeable about Iraqi weapons construction.

123. If, as in the first Gulf War, the United States had negotiated with the French to set a firm deadline—of perhaps one month or six weeks—after which the use of force would have been authorized, the deadline itself would have maintained pressure on Saddam Hussein to continue destroying unconventional weapons.



Saddam's venality, Chirac's obstinacy, and the United Nations's fecklessness all deserve a good share of the blame. Perversely, Chirac's overbroad veto threat virtually ensured the future weakening of the Security Council, the only U.N. organ in which his country holds disproportionate power.

Some of the blame surely belongs to Congress, which did not follow its Gulf War precedent of demanding first that the President obtain nuanced Security Council authorization for force, and only then authorizing the President to use force to the extent necessary to enforce Security Council resolutions.<sup>124</sup> Such an approach would have forced Congress to clarify whether America's real goal in going to war with Iraq was promoting inspections, ensuring disarmament, promoting regime change, or imposing democracy by military force. Instead, Congress avoided these nuances and gave the President a virtual blank check to use force with or without U.N. approval, giving the President *carte blanche* to abandon his search for a second Security Council resolution at the eleventh hour.<sup>125</sup>

But much of the blame must also go to the Bush Administration's decision to frame the issue in bipolar terms—either attack, or accept a status quo in which Saddam builds unconventional weapons and brutalizes his own citizens without sanction. By flattening the issue in this way, the Bush Administration discouraged examination of a meaningful third way: to *disarm Iraq without attack* through a multilateral strategy of disarmament plus enhanced containment plus more aggressive human rights intervention. That strategy would have supported continuation of the initial Bush approach of diplomacy backed by threat of force: restoring effective U.N. weapons inspections, disarming and destroying Iraqi weapons of mass destruction, and cutting off the flow of weapons and weapons-related goods into Iraq. At the same time, however, this strategy would have also pressed more aggressively for the insertion of human rights monitors, supporting the forces of peaceful democratic opposition in Iraq, as well as developing the "Milosevic-type" possibility of diplomatically driving Saddam and his top lieutenants into exile and bringing them to justice before an appropriate international tribunal.<sup>126</sup>

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124. See Harold Hongju Koh, *Presidential War and Congressional Consent: The Law Professors' Memorandum in Dellums v. Bush*, 27 STAN. J. INT'L L. 247 (1991) (reviewing resolutions that led to the first Gulf War).

125. See Bruce Ackerman, *Never Again*, AM. PROSPECT, May 1, 2003, at 24.

The premature congressional decision has distorted the process by which the nation made the choice for war.

For starters, it endowed the congressional debate with an Orwellian quality. The authorization of war typically raises a profound but straightforward question: Are you for it or against it?

But suddenly lawmakers could vote for war and say they were voting for peace—they were merely providing the president with a much-needed bargaining chip. Rather than a solemn act of accountability, the vote turned into a buck-passing operation.

*Id.*

126. As the former head of Human Rights Watch recently recalled, in May 1992, Human Rights Watch arranged for a U.S. Air Force transport plane to fly 18 tons of Iraqi

That strategy would have pursued disarmament and regime change not simply through coercion, but rather, through a transnational legal process solution, whereby the United States would have used the threat of U.N.-authorized force to demand that Saddam and his sons leave Iraq to face prosecution before either the International Criminal Court or an ad hoc tribunal.<sup>127</sup> Although the Bush Administration ultimately offered this option on the eve of war, it was not a credible one, because the United States had rejected the International Criminal Court and had not invested enough in an alternative legal process solution to make coerced departure plus prosecution a realistic means of regime change.

Such a strategy would have had obvious advantages: It would have avoided a bloody war, the financial and symbolic costs of that war, and the thousands of combatant and civilian deaths that war has entailed. More fundamentally, it would have secured Iraq's compliance with international law at no cost to the United States's own appearance of compliance. It would have strengthened the United States's capacity to return to the U.N. Security Council for the lifting of Iraqi sanctions,<sup>128</sup> to secure the support of the United Nations in identifying and destroying any unconventional weapons still in Iraq,<sup>129</sup> to secure a United Nations-supervised civilian reconstruction mission in Iraq, and to create an ad hoc criminal tribunal to prosecute apprehended Iraqi war criminals. But that strategy would have required genuine strategic

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secret police documents—which had been captured by Kurdish guerilla fighters—from Iraqi Kurdistan to the United States, which massively documented Saddam Hussein's and Hassan al-Majid's ("Chemical Ali's") "Anfal campaign," which murdered some 100,000 Kurds and gassed entire Kurdish villages over a six-month period in 1988. ARYEH NEIER, *TAKING LIBERTIES: FOUR DECADES IN THE STRUGGLE FOR RIGHTS* 163-64 (2003). For a full account, see HUMAN RIGHTS WATCH, *GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS* (1993), available at <http://www.hrw.org/reports/1993/iraqanfal>. Long before the most recent war, Human Rights Watch led the call for states parties to the International Court of Justice to sue Iraq under the ICJ dispute-settlement provision of the Genocide Convention or for the Security Council to create an ad hoc tribunal to indict and try Saddam and his leading lieutenants. See, e.g., Kenneth Roth, *Indict Saddam*, WALL ST. J., Mar. 22, 2002, at A14.

127. Indeed, a Milosevic-type solution was available even at the end of the first Gulf War, when the United States could have concluded that Saddam Hussein's continuation in power was a continuing threat to peace and security in the region. Had it done so, the first Bush Administration could have refused to endorse U.N. Security Council Resolution 687 of April 3, 1991, which declared a formal cease-fire in effect, until Saddam and his sons had actually left Iraq. With hundreds of thousands of U.S. troops still in Iraq, and Saddam's forces in shambles, it seems likely that Saddam would have eventually complied.

128. Compare Mike Allen, *Bush Urges U.N. to Lift Sanctions on Iraq: New Way of War Will Help U.S. Target Threats*, WASH. POST, Apr. 17, 2003, at A1 ("Baghdad's road out of sanctions is likely to be one of the first tests of whether Security Council members can work together after the bitterness that led the United States and Britain to launch the war without the imprimatur of the United Nations."), with Felicity Barringer, *U.N. Vote on Iraq Ends Sanctions and Grants U.S. Wide Authority*, N.Y. TIMES, May 23, 2003, at A1 (describing "critical concessions" Washington and London had to offer to secure a Security Council resolution lifting Iraq sanctions).

129. See William J. Broad, *U.S. May Have to Allow Others to Inspect Iraqi Arms*, N.Y. TIMES, Apr. 14, 2003, at B4.

multilateralism. It would have required the United States to work with other global democracies to fight global terrorism. Instead, the United States chose to ignore the very global partners who had helped it create the postwar system of international law and institutions precisely to provide nonmilitary multilateral options that did not exist during World War II.

Hot debate still rages over the legal justification of the Iraq war. At this writing, the U.S. government has yet to issue its own definitive legal justification for the war.<sup>130</sup> Although some American officials have suggested preemptive self-defense as an additional legal basis for the war, the core U.S. claim rests not on that murky ground, but on the much narrower claim that Iraq was in material breach of U.N. Security Council Resolutions 678, 687, and 1441.<sup>131</sup> Similarly, the contested British legal opinion justifying the war relies

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130. The United States has provided its most complete legal justification for the Iraq war in a letter from U.N. Ambassador John Negroponte to the President of the Security Council. See Letter from U.N. Ambassador John Negroponte to Ambassador Mamady Traore, President of the Security Council (Mar. 20, 2003), available at [http://www.usembassy.it/file2003\\_03/alia/A3032109.htm](http://www.usembassy.it/file2003_03/alia/A3032109.htm); see also *infra* note 131. The Legal Adviser of the U.S. State Department, William Howard Taft IV, seems to have made a similar argument in a recent speech before the National Association of Attorneys General. See Peter Slevin, *U.S. Says War Has Legal Basis: Reliance on Gulf War Resolutions Is Questioned by Others*, WASH. POST, Mar. 21, 2003, at A14.

William Howard Taft IV, the department's legal adviser . . . said Iraq's failure to comply with three council orders nearly 13 years apart was the principal legal justification for war. "The basis in international law for the use of force in Iraq today is clear. . . . There is clear authorization from the Security Council to use force to disarm Iraq," Taft said. "The president may also, of course, always use force under international law in self-defense."

Meanwhile, a National Security Council staffer, John Bellinger III, has published a short paper asserting that "[t]he United States has clear authority under international law to use force against Iraq under present circumstances," including the notion that, "in the modern age in which terrorism and the proliferation of WMD [weapons of mass destruction] pose grave risks to global security, states cannot be required to wait for an attack before they can lawfully use force to defend themselves against forces that present a clear and present danger of attack." See John Bellinger III, *Authority for the Use of Force by the United States Against Iraq Under International Law* (Apr. 10, 2003), at <http://www.cfr.org/publication.php?id=5862>.

131. U.N. Ambassador Negroponte's letter to the Security Council, *supra* note 130, states in relevant part that:

The actions being taken are authorized under existing Council resolutions, including resolution 678 (1990) and resolution 687 (1991). Resolution 687 imposed a series of obligations on Iraq, including, most importantly, extensive disarmament obligations, that were conditions of the cease-fire established under it. It has long been recognized and understood that a material breach of these obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678. This has been the basis for coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by the Secretary General's public announcement in January 1993 following Iraq's material breach of resolution 687 that coalition forces had received a mandate from the Council to use force according to resolution 678.

Iraq continues to be in material breach of its disarmament obligations under resolution 687, as the Council affirmed in resolution 1441. Acting under the authority of Chapter VII of the UN Charter, the Council unanimously decided that Iraq has been and remained in material breach of its obligations and recalled its repeated warnings to Iraq that it will face serious consequences as a result of its continued violations of its obligations. The resolution

at bottom not on broad customary law arguments about preemptive self-defense or humanitarian intervention, but on two narrow resolution-based arguments.<sup>132</sup>

then provided Iraq a "final opportunity" to comply, but stated specifically that violations by Iraq of its obligations under resolution 1441 to present a currently accurate, full and complete declaration of all aspects of its weapons of mass destruction programs and to comply with and cooperate fully in the resolution's implementation would constitute a further material breach.

The government of Iraq decided not to avail itself of its final opportunity under resolution 1441 and has clearly committed additional violations. In view of Iraq's material breaches, the basis for the cease-fire has been removed, and use of force is authorized under resolution 678.

Iraq repeatedly has refused, over a protracted period of time, to respond to diplomatic overtures, economic sanctions, and other peaceful means designed to help bring about Iraqi compliance with its obligations to disarm and to permit full inspection of its WMD and related programs. The actions that coalition forces are undertaking are an appropriate response. They are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area. Further delay would simply allow Iraq to continue its unlawful and threatening conduct.

Letter from U.N. Ambassador John Negroponte, *supra* note 130.

132. Lord Goldsmith, the Attorney General, placed the following parliamentary answer into *The Times* (London):

Authority to use force against Iraq exists from the combined effect of resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the UN Charter which allows the use of force for the express purpose of restoring international peace and security:

1. In resolution 678 the Security Council authorised force against Iraq, to eject it from Kuwait and to restore peace and security in the area.

2. In resolution 687, which set out the ceasefire conditions after Operation Desert Storm, the Security Council imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in order to restore international peace and security in the area. Resolution 687 suspended but did not terminate the authority to use force under resolution 678.

3. A material breach of resolution 687 revives the authority to use force under resolution 678.

4. In resolution 1441 the Security Council determined that Iraq has been and remains in material breach of resolution 687, because it has not fully complied with its obligations to disarm under that resolution.

5. The Security Council in resolution 1441 gave Iraq "a final opportunity to comply with its disarmament obligations" and warned Iraq of the "serious consequences" if it did not.

6. The Security Council also decided in resolution 1441 that, if Iraq failed at any time to comply with and cooperate fully in the implementation of resolution 1441, that would constitute a further material breach.

7. It is plain that Iraq has failed so to comply and therefore Iraq was at the time of resolution 1441 and continues to be in material breach.

8. Thus, the authority to use force under resolution 678 has revived and so continues today.

9. Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force.

I have lodged a copy of this answer, together with resolutions 678, 687 and 1441 in the Library of both Houses.

*Lord Goldsmith's Statement*, TIMES (London), Mar. 18, 2003, at A2. In response to that assertion, the Deputy Legal Adviser to the Foreign Secretary, Elizabeth Wilmhurst, resigned from the Foreign Office. See Ewen MacAskill, *Adviser Quits Foreign Office over Legality of War*, GUARDIAN, Mar. 23, 2003, at 1; see also Letter to the Editor, *War Would Be Illegal*, GUARDIAN, Mar. 7, 2003, at 13 (letter signed by sixteen professors of international law at

First, the opinion argues, the U.N. Security Council's explicit authorization of force in resolution 678, which was suspended by the cease-fire of April 1991 that ended the first Gulf War, "revived" upon Iraq's recent failures to meet its disarmament obligations. Second, the opinion suggests resolution 1441 was effectively self-executing, with individual U.N. members entitled to determine whether to use force against Iraq as part of the "serious consequences" Iraq should face for noncompliance.

In my view, the Iraq invasion was illegal under international law.<sup>133</sup> While justifying the war through narrow parsing of U.N. Security Council resolutions is far preferable to unmoored claims of "preemptive self-defense," the legal arguments based on "revived force" under resolution 678 and "serious consequences" under resolution 1441 still strike me as unpersuasive.<sup>134</sup> The problem with both arguments is that they disdain the need for political legitimacy in a strained quest for legal authority. The "revived force" argument relies on twelve-year-old resolutions passed by earlier Security Councils at a time when the United States demonstrably cannot muster nine votes for war in the current Security Council. Invoking that argument to justify force tells current U.N. members that their current votes and opinions don't really matter. The only Security Council resolution explicitly authorizing the use of force against Iraq was resolution 678, passed in November 1990 shortly after the invasion of Kuwait. The only military action it explicitly authorized was such force as was necessary to restore Kuwait's sovereignty and to restore peace and security to the region (as was later done, for example, through the creation of northern and southern "no-fly zones"). Similarly, U.N. Security Council Resolution 687, which declared the 1991 ceasefire to the Gulf War, required Iraq to destroy its weapons of mass destruction. But at this writing, the United

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Oxford, Cambridge, London, and Paris asserting the illegality of a war convened without a second Security Council resolution).

133. To the extent that the military action exceeded the authorization provided by the U.N. Charter and existing Security Council resolutions, it also ran afoul of Article II of the Constitution's directive that the President "take Care that the Laws be faithfully executed" and enforce the United Nations Charter, a treaty duly approved by the Senate, as the "supreme Law of the Land." U.S. CONST. art. II, § 3; *id.* art. IV. As a matter of domestic law, however, the President's decision is almost certainly immunized from legal challenge by the sweeping terms of the Congressional resolution cited *supra* note 120.

134. Nor do I believe that the multilateral use of military force by 17 NATO nations in response to ethnic cleansing in Kosovo, which was expressly premised on customary "humanitarian intervention" grounds, somehow justified the Iraq invasion, which lacked similarly broad multilateral support and explicitly invoked no such customary rationale. See also Ivo Daalder, *Bush's Coalition Doesn't Add Up Where It Counts*, *NEWSDAY* (Melville, Long Island, N.Y.), Mar. 24, 2003, at A16 (noting that, besides the United Kingdom, the United States's only genuine military partners in the Iraq war are Australia, which has contributed 2000 troops; Denmark, which has contributed a submarine and naval escort; and Poland, which has contributed 200 troops and a refueling ship, "all in all, less than one percent of the total number of troops in the region"; and reporting that, by contrast, in the first Gulf War, "32 countries joined the United States in combat, providing 160,000 troops, more than 500 combat aircraft, and more than 60 naval vessels").

States still has not demonstrated that such destruction was not finally occurring under the U.N. inspections regime in operation at the time when the United States launched its invasion.

Similarly, resolution 1441 gave Iraq “a final opportunity to comply with its disarmament obligations” and warned Iraq of “serious consequences” if it did not comply. But by choosing the words “serious consequences,” not authorizing the member states to use “all necessary means”—the term of art used to authorize the use of force under Security Council resolutions authorizing intervention in Rwanda, Bosnia, Somalia, Haiti, and Iraq itself—resolution 1441 deliberately *avoided* authorizing force, apparently hoping that, when the time came, there would be a clearer political consensus to do so. It seems highly unlikely that the Security Council members who voted unanimously for resolution 1441, including permanent members France and Russia and such other members as Syria, intended by so voting to authorize a future use of force without further explicit U.N. action.<sup>135</sup> It is thus disingenuous to pretend that these past legal instruments somehow created a present political consensus within the United Nations that legally authorized the war, when recent events had made manifestly clear that in fact, there was none.

As the second Gulf War wound down, the growing discrepancy between America’s hard power and soft power had become painfully clear. At the same time as the United States was using stunning military technology to bomb Baghdad, it could not diplomatically secure the votes even of its closest allies on a matter that the President deemed of highest national importance. Administration officials railed against egregious Iraqi violations of the Geneva Conventions against U.S. soldiers, seemingly oblivious to the fact that much of the world had already concluded that the United States was flouting the Geneva Conventions on Guantanamo. The President called for prosecution of Iraqi war criminals, without relenting in his opposition to the International Criminal Court. And U.S. officials who spoke only days before about the irrelevance of the United Nations to launching our attack, spoke confidently about their expectation that the United Nations would authorize the lifting of sanctions and support the massive effort necessary to clean up and build a democratic, postwar Iraq.

In a remarkably brief time, the war against Iraq has turned into a new global debate about American exceptionalism. As Fareed Zakaria recently put it:

America is virtually alone. Never will it have waged a war in such isolation. Never have so many of its allies been so firmly opposed to its policies. . . . In

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135. Indeed, Syria’s foreign minister later claimed that his country voted in favor of resolution 1441, rather than abstaining, because of a letter from U.S. Secretary of State Colin Powell “in which he stressed that there is nothing in . . . resolution [1441] to allow it to be used as a pretext to launch a war on Iraq.” Patrick Wintour & Brian Whitaker, *UK Expects Iraq to Fail Arms Tests*, *GUARDIAN* (London), Nov. 11, 2002, at 1.

fact, the debate is not about Saddam anymore. It is about America and its role in the new world. . . . A war with Iraq, even if successful, might solve the Iraq problem. It doesn't solve the America problem. What worries people around the world is living in a world shaped and dominated by one country—the United States.<sup>136</sup>

Given this posture, what role is left for transnational legal process? Left unrestrained, it seems clear, a continuing impulse to double standards will continue to weaken American soft power and damage the rule-of-law structures that postwar America helped put in place. Bad exceptionalism will diminish American sovereignty, in Abe and Toni Chayes's sense of "membership in reasonably good standing in the regimes that make up the substance of international law."<sup>137</sup> Yet at the same time, an array of institutions—Congress, the courts, the executive bureaucracy, the media, intergovernmental organizations, the American public, as well as foreign governments, nongovernmental organizations, and publics—can work together to mitigate these impulses.

In the wake of the disastrous Vietnam War, Congress reawakened and reasserted legislative controls on foreign policymaking, conditioning executive decisions on legality and human rights standards.<sup>138</sup> There is still time for the United States Supreme Court to place limits upon executive overreaching in the name of national security, and to tip more decisively toward a transnationalist jurisprudence. Even if this Court does not do so immediately, it should be clear that, increasingly, U.S. courts are not the last word even on the legality of U.S. executive branch decisions.<sup>139</sup> Executive branch agencies, which have deeply internalized standards on prosecuting terrorists in domestic courts<sup>140</sup> or observing the Geneva Conventions, should resist political pressure to bend these rules.<sup>141</sup> The domestic and foreign media are quick to expose hypocrisy, and CNN and the Internet now spread global word of U.S. legal violations almost instantaneously. The global information explosion has permitted "social internalization" of norms to occur at unprecedented speed, as illustrated by the simultaneous coordinated marching of millions of people worldwide to protest

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136. Zakaria, *supra* note 54, at 22-23.

137. See *supra* note 1.

138. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1991).

139. See Koh, *The "Haiti Paradigm," supra* note 62.

140. See Bill Keller, *Trials and Tribulations*, N.Y. TIMES, Dec. 15, 2001, at A31 ("Over the past eight years, the U.S. attorney [for the Southern District of New York] . . . has successfully prosecuted 26 jihad conspirators, in six major trials and some minor ones. . . . Neither the Justice Department nor prosecutors in New York could recall for me a single specific instance when national security was actually compromised during the trials in New York.").

141. Bernard Weinraub, *Failing to Heed Warning, 7 Iraqi Women and Children Die*, N.Y. TIMES, Apr. 1, 2003, at B1.

the war.<sup>142</sup> These same factors now allow foreign leaders, publics, and nongovernmental organizations to participate in domestic U.S. political debate more directly than ever before.<sup>143</sup> Leading international bureaucrats, such as Kofi Annan, and transnational norm entrepreneurs, like the Pope, Mary Robinson, Jimmy Carter, or Nelson Mandela, can use their public profiles to speak out against U.S. double standards.<sup>144</sup> In short, by invoking transnational legal process, opponents of American double standards can provoke myriad interactions, and generate multiple interpretations that can continue to promote U.S. respect for universal human rights standards and the rule of law.

In short, the diplomatic missteps that led to the Iraq War need not signal the demise of international law. Transnational legal process may still chart a way forward. But in the end, the greatest danger America faces will not abate even after it secures control of the palaces of Baghdad or the oilfields of Rumeila. The norm internalization I fear most will not occur in the United States, a liberal polity with a vibrant civil society, regular electoral cycles, and a robust culture of dissent. What I fear most is the norm that will be internalized throughout the Middle East because of the war against Iraq. I fear that that norm will not be a commitment to American-style democracy or the Bush Doctrine, but rather, to a regional ethos of anti-Americanism. Left unanswered, in the decades ahead, that norm may produce far more resentment, suicide bombers, and terrorists than all of America's hard power could ever handle.

### CONCLUSION

In closing, my message is this: The question is not how do we feel about American exceptionalism, but do we have a strategy to encourage the right kinds of exceptionalism, namely, exceptional American leadership, while discouraging double standards? I have argued that there are many faces of American exceptionalism, and that our goal should be to reduce double standards while expanding our capacity for global leadership. My preferred channel to pursue both goals is transnational legal process.

As this war on terror wears on, a transcendent issue in the debate over U.S. foreign policy will be what kind of world order is emerging, and what America's role in it will be. After September 11, the United States does not have the option of isolationism. Like it or not, Americans must be internationalists, but we do have a choice. America's choice is not isolationism versus internationalism, but what version of internationalism will we pursue? Will it be power-based internationalism, in which the United States gets its way

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142. See Koh, *supra* note 20 (discussing social internalization).

143. Tony Blair and Amnesty International are two obvious examples.

144. See Koh, *supra* note 20 (discussing role of transnational norm entrepreneurs in mobilizing transnational legal process).



because of its willingness to exercise power whatever the rules? Or will it be norm-based internationalism, in which American power derives not just from hard power, but from perceived fidelity to universal values of democracy, human rights, and the rule of law?

As a nation conceived in liberty and dedicated to certain inalienable rights, the United States has strong primal impulses to respond to crisis not just with power alone, but with power coupled with principle. After September 11, our challenge, as American lawyers, academics and activists, is not to condone double standards or to declare the human rights era over, but to use process to prod the country we love to follow the better angels of its national nature.