

# Exceptionalism Again: The Bush Administration, the “Global War on Terror” and Human Rights

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When former UN Secretary General, Kofi Annan, gave his farewell address in December 2006, he expressed his dismay at the Bush administration’s conduct during its anti-terrorist campaign. The United States had given up its vanguard role in the promotion of human rights, he averred, and appeared to have abandoned its ideals and principles. There have been many statements similar to this one made in the period since September 2001. Even close allies, such as the British government, for example, have called for the closure of the Guantanamo Bay detention facility on the grounds that, as a symbol of injustice, it had tarnished the United States as a “beacon of freedom, liberty and justice.”<sup>1</sup>

However, while Annan’s and other such statements capture some aspects of past US behavior—its activism in the promotion of human rights overseas and the role it has sometimes played as a positive example to be emulated—they neglect a large part of US history in this area. America has provided leadership but has also regularly practised exceptionalism with respect to

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1. Secretary General, Kofi Annan, Harry S. Truman Library, at <http://www.un.org/apps/sg/sgstats.asp?nid=2357> (11 Dec. 2006); statement by the UK Attorney General, “UK told US won’t shut Guantanamo” at [http://news.bbc.co.uk/1/hi/uk\\_politics/4759317.stm](http://news.bbc.co.uk/1/hi/uk_politics/4759317.stm) (11 May 2006).

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signature of international treaties. Its behavior with respect to human rights has also often fallen well short of the standards expected of a democratic state. It has been both a leader, at times, but also an outlier,<sup>2</sup> (or “a buttress, not a pillar” in Louis Henkin’s famous phrase). While, since the 1970s, it has had a relatively well-developed human rights element in its external foreign policy (even if inconsistently applied), it has long been reluctant to accept multilateral international supervision of its domestic human rights practices. This reluctance has been reflected in its failure to ratify some of that regime’s core covenants. Where it has ratified treaties, its introduction of various reservations, understandings, and declarations have attracted the criticism of other states as well as the UN’s human rights bodies.<sup>3</sup>

Explanations for this exceptionalism range from the cultural, to the institutional, to the power-political. Americans tend to believe in the superiority of their political and constitutional arrangements and that they have little or nothing to learn from international legal instruments; they are concerned to protect the balance between states’ rights and the federal authorities and the signature of international treaties augments the power of the latter; and they fear politically biased targeting because of the global power and presence of the United States, and the resentment of that dominance.<sup>4</sup> That super-power status has also given the United States certain responsibilities for sustaining world order, responsibilities that may require it (so some in the United States argue) sometimes to suspend the rules for the greater good.<sup>5</sup>

Exceptionalism, then, embodies many features, not all of which will come under discussion in this article. My focus will be on those cultural

2. Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005), 2.

3. The Human Rights Committee stated with reference to US signature of the ICCPR: “The Committee regrets the extent of the State party’s reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted what is already the law of the United States.” Quoted in William A. Schabas, “Spare the RUD or Spoil the Treaty: The United States Challenges the Human Rights Committee on Reservations,” in *The United States and Human Rights: Looking Inward and Outward*, ed. David P. Forsythe (Lincoln: University of Nebraska Press, 2000), 111.

4. Andrew Moravcsik suggests that four forces are responsible for America’s ambivalent and unilateralist human rights policy: the stability of its democracy; its geopolitical power; ideological conservatism; and political decentralization. See his “Why Is U.S. Human Rights Policy So Unilateralist?” in *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement*, ed. Stewart Patrick and Shepard Forman (Boulder: Lynne Rienner, 2002), 345–76.

5. On different rules, see W. Michael Reisman who argues that America’s role as the “ultimate custodian of international order” may require it “to act extra-legally or supra-legally with respect to those [international] institutions when an urgent issue of minimum world public order is at stake.” “The United States and International Institutions,” *Survival* 41 (Winter 1999–2000): 63–64.

ideas that emphasize America's perceived special qualities as a nation and superior or hegemonic role in global politics—based on both its power and its values. The emphasis will be placed on exceptionalism's consequences for America's external role. These perceptions of specialness encourage US administrations, when deemed necessary, to exempt themselves from the rules that others are expected to follow. In addition, they frequently encourage a militarized response to any attack on US interests. I ask how ideas related to this aspect of exceptionalism help us to understand better the Bush administration's decision to fight a "global war on terror" and, alongside that fight, to launch an assault on the laws of war and human rights law. What can be drawn from the historical concept of exceptionalism to explain this behavior and the costs that have come in its wake?

In taking my cue from Annan and others, I also seek to explain why that assault on human rights has been particularly far-reaching under the current government. My assumption is that Annan's and other officials' amnesia with regard to America's frequent "outlier" status and past record is in part induced by the extensive nature of the current assault on the rights of the person. What is it that explains the Bush administration's behavior with respect to these rules? Why has it been especially reluctant to apply humanitarian law when dealing with the terrorist threat since 9/11? And why have we witnessed an administration seemingly intent on attacking what must be seen as the most robust elements of the human rights regime (at least in legal terms if not in practice): the prohibition against torture; no detention without trial; presumption of innocence; and the rights of asylum, particularly in reference to the practice of rendition.<sup>6</sup>

This article first provides examples of US exceptionalist behavior since the terrorist attacks, before entering more fully into an explanation of why the Bush administration has tried to rewrite the rules in a counter-terrorist era. This section draws on the historical understanding of exceptionalism to aid in the explanation. Next, it assesses some of the consequences this has had for US moral authority, comparing America's gradual loss of that status during the 1960s and early 1970s with the deep and rapid decline experienced in the contemporary era. Finally, it makes brief reference to what it might take for the United States to regain some of that standing.

In sum, and although the full explanation is likely to be a multi-causal one, I conclude that exceptionalism encouraged the Bush administration's decision to adopt the metaphor of war and to engage in militaristic behavior. The war metaphor, in the initial stages, also served to mobilize the domes-

6. On torture, see Rosemary Foot, "Torture: The Struggle over a Peremptory Norm in a Counter-Terrorist Era," *International Relations* 20.2 (2006): 131–51; and Tim Dunne, "'The Rules of the Game Are Changing': Fundamental Human Rights in Crisis after 9/11," in *International Politics* 44.2/3 (March/May 2006), esp. 276.

tic population and to centralize power in presidential hands (a long-term neo-Conservative desire). Indeed, the augmentation of presidential power may even have been an important motive behind the adoption of the war metaphor; yet the broader acceptance of that metaphor depended strongly on an exceptionalist line of argument.

However, while adoption of the war paradigm typically tips the balance against legal protections, the scale of the US assault on core norms requires further investigation. After all, as noted earlier, the United States as a liberal democratic state has been in the past a sometime, leading, promoter of human rights. Human rights protections are embedded in its Constitution and are part of its identity, so it is often stated. Thus, how can we explain this US attack on human rights and humanitarian law? It is suggested that exceptionalism in nationalist rather than globalist hands can inform our understanding in several ways. First we see exceptionalism expressed in the US reluctance to look outside of its own experience and to learn lessons from others that for decades or longer have had to deal with terrorist violence. In other words, it perceives its situation as unprecedented and this encourages a natural predilection for unilateralism. We also see exceptionalism in the way in which the notion of protecting “the first new nation,” the “city on a hill,” or “God’s chosen people” strengthens the belief that virtually any means can be used to defend the American community against evil. We see exceptionalism, too, in this administration’s notion that promotion of American ideals abroad, even by the sword, are not only beneficial to US security but also to the peace and stability of the world. That objective as well as the perceived rightness of the cause further encourage a focus on ends rather than means. Finally, we see a particular emphasis on a sub-division of exceptionalism—exemptionalism—within a Bush administration made up of conservative nationalists, or “new-sovereigntists,” who have long argued that the United States should never “cede its lawmaking authority to unelected and unaccountable global bureaucrats.”<sup>7</sup> For this group, exemptionalism is a good rather than a bad thing. To quote a representative of this belief, John Bolton, one-time US permanent representative to the United Nations, and obviously relieved at the election in 2000 of the new Bush administration: “the harm and costs to the United States of [globalists’] belittling our popular sovereignty and constitutionalism, and restricting both our domestic and our international

7. Stewart Patrick, “Multilateralism and Its Discontents,” in *Multilateralism and U.S. Foreign Policy*, ed. Patrick and Forman, 18. Michael Lind sees this as more sectionalist than nationalist. George W. Bush represents, he states, the “unilateral militarism” of the Protestant Religious Right in Texas and in other southern states. See his *Made in Texas: George W. Bush and the Southern Takeover of American Politics* (New York: Basic Books, 2003).

policy flexibility and power are finally receiving attention.” Or as he put it on another occasion, “the debate over global governance, fought out at the confluence of constitutional theory and foreign policy [is] *the* decisive issue facing the United States internationally.”<sup>8</sup>

### Exceptionalism Defined

US exceptionalism as applied to foreign policy has been defined elsewhere in much fuller terms than I have provided so far. Harold Hongju Koh takes it back to de Tocqueville and the perception that the US “differs qualitatively from other developed nations because of its unique origins, national credo, historical evolution, and distinctive political and religious institutions.”<sup>9</sup> Edward C. Luck, however, concentrates particularly on exceptionalism’s consequences for the US role in international politics. He describes it as

(1) a willingness to go it alone on a variety of issues, along with apparent immunity to the pressures and criticisms of others; (2) an assumption that its national values and practices are universally valid and its policy positions are moral and proper, not just expedient; (3) a strong tendency to look inward, to domestic political considerations and processes, when determining how to act in international forums, in some cases coupled with a willingness to adopt national legislation that contradicts the rules and responsibilities imposed by international arrangements; and (4) a belief by national policy makers and legislators that they have other options for pursuing their nation’s interests and that acting through multilateral institutions is only an option, not an obligation.<sup>10</sup>

8. John R. Bolton, “Should We Take Global Governance Seriously?” *Chicago Journal of International Law* 1 (Fall 2000): 206 and quoted in John Gerard Ruggie, “American Exceptionalism, Exemptionalism, and Global Governance,” in *American Exceptionalism and Human Rights*, ed. Ignatieff, 324. The second Bolton quote is from Patrick, “Multilateralism and Its Discontents,” 18. And see too the 2000 quote from Condoleezza Rice who criticized the Clinton administration for giving priority to “the interests of an illusory international community” whose support was allegedly necessary for “the legitimate exercise of power.” *Ibid.*, 13.

9. Harold Hongju Koh, “America’s Jekyll-and-Hyde Exceptionalism,” in *American Exceptionalism and Human Rights*, ed. Ignatieff, 112. Seymour Martin Lipset sees the classic emphases of exceptionalism as “liberty, egalitarianism, individualism, populism, and laissez-faire.” In *American Exceptionalism: A Double-Edged Sword* (New York: Norton, 1996), 31. Note also the title of chapter one of Anders Stephanson’s book, *Manifest Destiny: American Expansionism and the Empire of Right* (New York: Hill and Wang, 1995): “Choice and Chosenness, 1600–1820.” Stephanson argues that from the very beginning the United States “was a sacred-secular project, a mission of world historical significance.” *Ibid.*, 28.

10. Edward C. Luck, “American Exceptionalism and International Organization: Lessons from the 1990s,” in *US Hegemony and International Organizations*, ed. Rosemary Foot, S. Neil MacFarlane, and Michael Mastanduno (Oxford: Oxford University Press, 2003), 27.

I adopt this definition because it draws out the relationship between the domestic beliefs and their impact on the international realm. It also emphasizes the nationalism that is inherent in this aspect of exceptionalism. The Bush administration, few would doubt, has been conservative and nationalist in its orientation. This implies that, when confronted with international law, its natural response is to assume it has little to offer and should be viewed primarily as an unwelcome constraint. The tragic events of 11 September 2001 have strengthened this attitude. As the March 2005 National Defense Strategy states, and in a bizarre juxtaposition of factors: “Our strength as a nation will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes and terrorism.”<sup>11</sup>

Five or more years on from that terrorist attack, we have all become familiar with persistent US executive branch attempts to circumvent, overturn, or adapt core principles of human rights law, or the laws of war. However, familiarity cannot conceal the sweeping nature of that attack on what have long been regarded as the core legal rights of the person. The Bush administration has circumscribed the meaning of what has come to be regarded as torture, it has denied a proper legal status for detainees and prisoners held at Guantanamo Bay and in Afghanistan,<sup>12</sup> and has undercut another central plank of the Geneva Conventions when in May 2006 it refused to allow the International Committee of the Red Cross (ICRC) to have access to terrorist suspects held in secret locations. In September 2006 we had presidential confirmation that the US Central Intelligence Agency (CIA) had indeed been operating secret prisons in various overseas locations. But even if they have been temporarily emptied, the inmates sent to Guantanamo, and the ICRC at last given access to these prisoners, the prisons themselves have not been closed down. As places of detention, CIA interrogators remain unconstrained in terms of the methods they may adopt, George W. Bush using his executive power to ensure this outcome.

If the examples are themselves shocking, what has also been notable has been the openness with which these issues have been discussed. President Bush has publicly and strongly backed the idea that the new Defense Department interrogation manual, produced in 2006, not be applied to the CIA.<sup>13</sup> It was he who stated that the Geneva Conventions did not apply either to al Qaeda or Taliban detainees, adding that except as a matter of policy—and thus not as a matter of law—those imprisoned would be treated

11. “The National Defense Strategy of the United States of America,” March 2005, at <http://www.comw.org/qdr/fulltext/0503nds.pdf> (accessed 30 Dec. 2006).

12. For one of many discussions of this, see Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London: Allen Lane, 2005), esp. chap. 7.

13. *International Herald Tribune* (18 Sept. 2006), 8, editorial.

humanely. Alberto Gonzales, the US attorney general, in January 2005 during his confirmation hearings, informed US senators in writing that “cruel, inhuman and degrading treatment of detainees is forbidden to interrogators only within U.S. territory.” Others have noted the nature of the legal culture that has produced these statements. In his review of the torture memoranda produced in the Office of Legal Counsel (OLC) in 2002, David Luban has remarked that it was as though the OLC had been captured entirely by those who see international humanitarian law not as a source of guidance, but as something to be ransacked in search of loopholes, with the lawyer taking on the role of absolver not as adviser.<sup>14</sup> For Philippe Sands, administration lawyers were not providing advice, but “legal cover.”<sup>15</sup>

The pervasiveness of this attack on human rights protections in many other areas of US foreign relations has been less well covered in the academic literature. For example, in the workings of the UN Security Council’s Counter-Terrorist Committee (CTC), established under UN Resolution 1373 on 28 September 2001, the United States has often stood with China and Russia in being unsupportive of those who wanted to introduce phrasing in UN resolutions that would underline the necessity of countering terrorist acts after 2001 within the framework of humanitarian law. Only in 2003 did UN Security Council resolutions come to state that measures to combat terrorism had to be in compliance with international law, “in particular human rights law, refugee law and humanitarian law.” The US government played no part in effecting this change; in fact, these crucial phrases were left out of resolution 1373, which the US largely crafted.<sup>16</sup>

Further examples have come in relation to the duties of occupation forces in Afghanistan and Iraq. In January 2005, a US State Department lawyer contested the idea that human rights treaties apply extra-territorially, an “unusual conclusion [that] goes against the grain of some modern practice.”<sup>17</sup> It also directly contradicts the US proclamation (enshrined in two UN reso-

14. David Luban, “Liberalism, Torture, and the Ticking Bomb,” in *Virginia Law Review* 91 (2005): 1425–61. For other examples, see Foot, “Torture,” esp. 138.

15. Sands, *Lawless World*, 205. Sands also quotes George W. Bush on 11 Dec. 2003 stating: “International law? I better call my lawyer . . . I don’t know what you’re talking about by international law.” Ibid.

16. See Rosemary Foot, “The United Nations, Counter-Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas,” *Human Rights Quarterly* 29.2 (May 2007): 489–514.

17. Adam Roberts, “Human Rights Obligations of External Military Forces,” in *The Rule of Law in Peace Operations: Recueil of the International Society for Military Law and the Law of War*, 17th International Congress, Scheveningen (16–21 May 2006), ISMLLW, Brussels, 2006, 433. For a fuller discussion of occupation law, see his “Transformative Military Occupation: Applying the Laws of War and Human Rights,” *American Journal of International Law* 100.3 (July 2006): 580–622.

lutions) that one purpose of the occupation of Iraq was the promotion of human rights.<sup>18</sup> Turning to Afghanistan and the NATO-led International Security Assistance Force's classification and treatment of detainees, unlike other NATO members, a US framework document of 2006 omits any reference to the benefits of applying human rights law even though these laws reduce weaknesses in the law of armed conflict when it comes to protecting those persons detained or on trial.<sup>19</sup> These additional examples illustrate how pervasive this sense of a change to the rules has been and how unchastened the Bush administration remains despite evidence of abuses committed during interrogation, external criticism of US behavior (even from its allies), and internal criticism, as expressed in Supreme Court rulings and various instances of senatorial dissent.

### **Explaining Administration Policy**

This reluctance to apply international law, and in this instance especially humanitarian law, has been demonstrated in various venues and before various audiences. The hostility behind this reluctance helps to explain why the laws of war were not seen as a necessary first stop in determining how to treat the enemy. But why adopt a war response rather than describing the horrific attacks on 11 September as criminal acts in the first place? After all, America's ally, Britain, had refused to give the Irish Republican Army (IRA) the satisfaction of describing its struggle as an armed conflict and denied IRA detainees the status of prisoners of war.

For John Gaddis, the militaristic response was one that is deeply rooted in history. In drawing parallels between the George W. Bush administration and decisions taken by John Quincy Adams, the US secretary of state under President Monroe, Gaddis concludes that the American reaction to threats and particularly to surprise attacks has generally been to take "the offensive, by becoming more conspicuous, by confronting, neutralizing, and if possible overwhelming the sources of danger rather than fleeing from them."<sup>20</sup> For Walter Russell Mead this is more to do with competing traditions. He has referred to the US response after September 2001 as reflecting the triumph of the Jacksonian tradition in the American way of war: as he put it, the Bush administration, in true Jacksonian style, "believed that it was more important to frighten and deter potential enemies than to reassure friends. If the good guys had to be scared in order to make sure

18. Roberts, "Human Rights Obligations," 435.

19. *Ibid.*, 442.

20. John L. Gaddis, *Surprise, Security, and the American Experience* (Cambridge: Harvard University Press, 2004), 13.

the bad guys knew you were serious about it, so be it.”<sup>21</sup> Others see the military response after 2001 in more parochial terms: the US Defense Department and its budget overwhelms that of all other departments. Coupled with the US entry into a post–Cold War era where it has no peer military competitors, or peer ideological rivals, the militarized response was all but inevitable from this bureaucratic and global-structural perspective.<sup>22</sup>

Other scholars, though, highlight more explicitly the role that the exceptionalist tradition plays in explaining the adoption of militarized means for dealing with the terrorist threat. The historian Richard Crockatt has reminded us of some of the parallels (as well as some of the differences) between Pearl Harbor and the attacks of September 2001, both of which were swiftly followed by a massive military response. Crockatt refers to the absence of warning in both cases, but he also makes reference to the belief in 2001, as in 1941, that the United States had done nothing to invite attack, given its benign exercise of power and its innocence. As Vice-President Cheney put it in 2006, the nation in September 2001 “experienced one of the cruelest acts the modern world has seen.”<sup>23</sup> And President Bush famously remarked, “I’m amazed that there’s such misunderstanding of what our country is about that people would hate us. I’m like most Americans, I just can’t believe it because I know how good we are.”<sup>24</sup> Those beliefs, coupled once again with the exposure of US vulnerability, encouraged the use of hard military power and of ruthless measures. Crockatt argues that the “sense of America’s having been violated, resentment at the enemy for failing to play ‘by the rules,’ the underhanded nature of the attacks, and the naked exploitation of America’s openness (its ‘innocence’) unified the country and all but silenced the doubts about the need to respond vigorously.”<sup>25</sup> American feelings of self-righteousness smothered many of the doubts that might have been expressed about the means chosen to conduct this struggle. And though vulnerability has frequently been exaggerated to mobilize the US domestic population, officials knew that they had to adopt “language sanctioned by American tradition” to succeed in their mobilization goals.<sup>26</sup>

21. Walter Russell Mead, *Power, Terror, Peace, and War: America’s Grand Strategy in a World at Risk* (New York: Vintage Books, 2004), 115.

22. Robert Jervis, *American Foreign Policy in a New Era* (London: Routledge, 2005); Peter J. Katzenstein, “Same War—Different Views: Germany, Japan, and Counterterrorism,” *International Organization* 57 (Fall 2003): 740–41.

23. Vice President’s Remarks at the Veterans of Foreign Wars National Convention, <http://www.whitehouse.gov/news/releases/2006/08/20060828-4.html> (28 Aug. 2006) at 5.

24. Bush quoted in Anatol Lieven, *America Right or Wrong: An Anatomy of American Nationalism* (London: Harper Perennial, 2005), 52.

25. Richard Crockatt, *America Embattled* (London: Routledge, 2003), 9.

26. *Ibid.*, 35, referring to the work of John Thompson.

### Consequences of the War Metaphor

Metaphors work to diminish the power of alternative formulations and to make a policy seem natural. They shape the way in which we view the world around us as well as our actions. In one sense, the fundamental nature of the challenge to core human rights that came swiftly on the heels of 9/11 is unsurprising. The language of war has long been recognized as having an intimate relationship with the abuse of human rights. Detention without trial, arbitrary arrest, disappearance, torture and the like soon result once a political authority decides to describe a conflict in which it is involved as war.<sup>27</sup> National or regime security takes center stage, security ideologies play a stronger role, and the means employed push at the boundaries of the acceptable. Look at the language of National Security Council document 68 (April 1950) and the conduct of the Cold War: “the integrity of [the US] system will not be jeopardised by any measures, covert or overt, violent or non-violent, which serve the purposes of frustrating the Kremlin design.” The outcome was a vast increase in the US military budget; counter-insurgency, coups d’etat, destabilization and interventions in Latin America; the overthrow of Iranian leader Mohammad Mossadegh in 1953; and support for authoritarian governments in Indonesia, South Korea, the Philippines, and the Republic of China on Taiwan.<sup>28</sup>

Several statements by Bush administration officials provide evidence of the cognitive and behavioral repercussions once a conflict is described as war. Bradford A. Berenson—a former assistant to then White House Counsel and later Attorney General Alberto Gonzales—described the thinking of those with whom he worked in the months after 11 September 2001. War means, he said, that you are entitled to kill a “suspected adversary across from you, you’re entitled to kill that person with no due process or advance warning whatsoever.” The justifying principle in this case is the need to do everything possible to protect Americans even though “that is going to mean sometimes hurting innocents in the process.”<sup>29</sup> President

27. Steven C. Poe, C. Neal Tate, and Linda Camp Keith, “Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976–1993,” *International Studies Quarterly* 43.2 (1999): 291–313.

28. Julia Sweig comments on some of these instances in *Friendly Fire: Losing Friends and Making Enemies in the Anti-American Century* (New York: Council on Foreign Relations, 2006), 17 and 26. See also Stephen Kinzer, *Overthrow: America’s Century of Regime Change from Hawaii to Iraq* (New York: Times Books, 2006).

29. “Detention and Interrogation of Captured ‘Enemies’: Do Law and National Security Clash?” transcript prepared from a tape recording, the Brookings Institution, <http://www.brookings.edu/com/events/20051212judicial.htm> (12 Dec. 2005), 13–21. For the views of a powerful voice within the OLC between 2001 and 2003, reflective of Berenson’s perspective, see John Yoo, *War by Other Means: An Insider’s Account of the War on Terror* (New York: Atlantic Monthly Press, 2006).

Bush's muddled statements on the Geneva Convention, aided and abetted by many high level officials who pointed to the (unproven) culpability and wickedness of those held in detention, did more, though, than push the argument that the war metaphor meant you could kill suspected terrorists, rather than capture and prosecute them through a legal framework. These officials insisted that, though this was a war, it was war of a particularly dirty kind that required a dirty response. Even President Franklin Roosevelt's statements were drawn upon to show that he, too, had recognized the need to fight dirty when up against "treacherous enemies."<sup>30</sup> The laws of war were inappropriate for such special circumstances and were in fact "quaint" to quote Gonzales in reference to Geneva Convention III. They could not possibly apply to those who sought to "impose a dark vision of tyranny and terror across the world."<sup>31</sup>

The Manichean and polarized language used in this and several other administration statements, again typical of war-time, has added further muscle to those advocating the stripping away of the legal constraints on behavior. In Bush's State of the Union speeches, his address to a joint session of Congress on 20 September 2001 and in the 2002 and 2006 National Security Strategy Documents, the struggle against terrorists has been depicted as between good and evil, us and them, those who liberate and those who tyrannize. Historical parallels have been drawn in an attempt to make the anti-terrorist campaign appear as "just," an essential framing as the conflict has come to be described as a "long war," and as public disapproval of the intervention in Iraq has strengthened. As Bush put it in August 2006, "The war we fight today is more than a military conflict; it is the decisive ideological struggle of the 21st century. On one side are those who believe in the values of freedom and moderation—the right of all people to speak, and worship, and live in liberty. And on the other side are those driven by the values of tyranny and extremism . . . They're successors to Fascists, to Nazis, to Communists, and other totalitarians of the 20th century."<sup>32</sup>

30. Vice-President Cheney quoted Roosevelt as stating during WW II: "Modern warfare against treacherous enemies is a dirty business. We don't like it—we didn't want to get in it—but we are in it and we're going to fight it with everything we've got." Remarks at the Veterans of Foreign Wars National Convention (28 Aug. 2006) at <http://www.whitehouse.gov/news/releases/2006/08/20060828-4.html>.

31. This phrase is typical of the language used in major Bush administration speeches. This one is taken from Bush's address to the American Legion National Convention, Salt Lake City (31 Aug. 2006) at <http://www.whitehouse.gov/news/releases/2006/08/20060831-1.html>. Secretary of State Colin Powell argued against the Gonzales claim that Geneva did not apply. See Sands, *Lawless World*, 154.

32. Bush's American Legion speech (see above, note 31).

**Discounting Others' Experience**

This reference to previous, all consuming, struggles of the twentieth century has pointed up one other aspect of the American exceptionalist tradition that is relevant to an explanation of Bush administration conduct of its “war on terror.” America’s tendency toward historical amnesia has made it reluctant to draw lessons other than the fact of final and total victory from those past twentieth-century struggles—a difficult if not impossible outcome when it comes to the phenomenon of terrorism. The administration has been unreceptive to those who have cautioned against strengthening the national security state as happened in the Cold War era. Many governments in Latin America, for example, have expressed their unease at the language adopted and methods used to deal with this current struggle. They look back to the Cold War not as US political elites tend to: as a “sustained and deft combination of soft and hard power that brought about the defeat of communism and ushered in democracy where once there was only despotism.” Rather they see it as an era where authoritarian governments used the war against terrorist, communist insurgents, as they tended to describe them, to engage in “kidnappings, assassinations, torture, and repression.”<sup>33</sup> Human rights violations in Argentina and Chile came to a peak during the presidencies of Richard Nixon and Gerald Ford, yet these administrations categorized authoritarian governments not as blatant abusers of human rights but as opponents of chaos in countries that were “under violent attack from radical, antidemocratic, and antimarket forces.” That permissive framing gave these governments the “green light” to accelerate what was then also described as a war against terrorism.<sup>34</sup>

Germany and Japan have been similarly reluctant to accept the war metaphor or a strengthened role for the state primarily because of their pre-war and World War II experiences with fascist government. Among other things, Germany learned from that experience that the security forces, including the intelligence arm, needed to be subject to strong parliamentary oversight.<sup>35</sup> During Germany’s period as a non-permanent member of the Security Council in 2002–2003, its Foreign Ministry was

33. Sweig, *Friendly Fire*, 27 and 160. Paul Wolfowitz, then deputy secretary of defense, reflected this myopic point of view when he said in February 2003, “we’re not talking about the occupation of Iraq. We’re talking about the liberation of Iraq . . . therefore, when that regime is removed we will find [the Iraqi population] . . . basically welcoming us as liberators.” Quoted in Roberts, “Transformative Military Occupation,” 608.

34. Kathryn Sikkink, *Mixed Signals: U.S. Human Rights Policy and Latin America* (Ithaca: Cornell University Press, 2004), 113, quoting the memoirs of former US Secretary of State Henry A. Kissinger.

35. Peter J. Katzenstein, “Same War—Different Views,” 740–41.

particularly active in pressing for greater legal constraints in the conduct of this current anti-terrorist campaign. It emphasized, for example, the need to appoint a human rights expert to the CTC's counter-terrorism executive directorate and to ensure that UN resolutions expressed the necessity for counter-terrorist measures to be in compliance with international human rights law. As a member of the German delegation to the UN put it: "International law clearly stipulates that counter-terrorism actions must at all times respect due process and the rule of law. There can be no trade-off between human rights and effective security measures. Indeed, respect for human rights must remain an integral part of any comprehensive counter-terrorism strategy."<sup>36</sup>

The US has also been unreceptive to the view that the al Qaeda network is not entirely unprecedented. Audrey Cronin, in her masterful historical survey of terrorist groups and their defeat or demise, concludes that "Al-Qaida is an amalgam of old and new, reflecting twenty-first-century advances in means or matters of degree rather than true originality." She notes, however, the US tendency to treat it as unique, "as if the decades-long experience with fighting modern terrorism were totally irrelevant." She observes, too, the US tendency to formulate policy "organically and instinctively . . . with a strong bias toward U.S. exceptionalism."<sup>37</sup>

A corollary of the presumed irrelevance of others' experience is the assumption of the universality of US values. These beliefs are at the root of the Bush administration's assumption that it would be greeted as liberators and not occupiers of Iraq. They are behind the efforts of the administration to give teeth (or boots) to what Woodrow Wilson had once recognized as a US duty: "to show the way to the nations of the world how they shall walk in the paths of liberty." The administration's national security strategy has called on the nation to promote its values abroad—"freedom, democracy, and human dignity"—in order to ensure peace and stability for all as well as to protect security at home. In President's Bush speech in June 2002 at West Point he claimed it as "America's duty" to build a "just peace" that favored "human liberty." For him, the end of the twentieth century witnessed the triumph of "a single surviving model of human progress" that America stood ready to promote. Four years later, the rhetoric was the same. In Cheney's words: "The ideals that gave life to this nation are the same ideals we uphold at home and that we serve abroad. We fight not only to protect ourselves and to overcome the dangers to civilization, but to liberate the oppressed, and to give others the chance to decide their

36. UN Doc. S/PV.5104, 17 Dec. 2004, p. 8.

37. Audrey Kurth Cronin, "How al-Qaida Ends: The Decline and Demise of Terrorist Groups," *International Security* 31.1 (Summer 2006): 7, 39, and 46–47.

own destiny, so that all of us can one day live in peace on the foundation of human freedom.”<sup>38</sup>

Even when persuasive rather than coercive tactics are employed, the US government has again assumed that its values carry well beyond its shores and have widespread appeal. The public diplomacy program, for example, has been built on the belief that knowledge of US values will reduce the attraction of extremist groups, whereas a more effective strategy would be, as Cronin argues, “tapping into a growing international norm against killing innocent civilians.”<sup>39</sup>

### Unilateralism

The reluctance to draw lessons from others’ experience reinforces a sense of being unique, encourages unilateralism, and is reinforced by what is a predisposition already associated with exceptionalism. US unilateralism has been on frequent display throughout the Bush administration’s period in office, but in especially obvious ways during its anti-terrorist campaign. Its absorption with this struggle to the neglect of other security threats, its use of the language of “with us or against us,” its preference for coalitions of the willing that it will lead rather than consult, and lack of receptivity to UN views of how best to counter terrorism are reflective of this belief that it is the United States that knows best what is to be done to restore world order. The invocation of Article Five of the NATO treaty in September 2001, while seen momentarily as US recognition, in an hour of need, of the benefits of multilateral consensus, swiftly received grateful acknowledgment but had no practical effect. The administration had no intention of accepting that this initial phase of the “war against terror” would be a multilateral NATO operation.

Unilateralism, of course, has deep roots in the United States and is hardly a feature solely associated with the Bush administration. In the human rights field, this aspect of exceptionalism has long been particularly marked. Whereas Europe post World War II took the opportunity to institutionalize and multilateralize human rights protections, for example through the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and the establishment of the European Court of Human Rights,<sup>40</sup>

38. President Bush Delivers Graduation Speech at West Point (1 June 2002), <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>. Vice-President’s Remarks at the Veterans of Foreign Wars National Convention (28 Aug. 2006), <http://www.whitehouse.gov/news/releases/2006/08/20060828-4.html> at 6.

39. Cronin, “How al-Qaida Ends,” 45.

40. What the existence of this Convention can mean for signatory states, at least those

the United States backed away from signature of any treaty or alignment with any body that would lead national law to be subordinated to international law. In this early period, the arguments against the core covenants, including the genocide convention, were made by a combination of states' rights advocates, southern conservatives, and racists. Only in the late 1980s and early 1990s did we see ratification of that convention (1989), together with ratification of the International Covenant on Civil and Political Rights (ICCPR, 1992) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1994). One consequence of this late and reluctant ratification has been, according to Julie A. Mertus among others, that the US public has little awareness of international human rights standards.<sup>41</sup> This impoverishes the domestic human rights culture and weakens the influence that human rights can have on policy-making. As Jack Donnelly has put it: "Most Americans apparently believe that 'human rights' problems exist only in places that must be reached by flying over large bodies of salt water."<sup>42</sup> Perhaps this helps to explain why the US domestic population has not appeared particularly aroused by US encroachments on its own, and especially on non-citizens' civil liberties in the post 9/11 period.

### Losing Moral Authority

As noted earlier, wars correlate in negative ways with human rights protections, but there are ways, too, in which twentieth-century wars have had a positive effect on the development of the human rights regime, making the global human rights culture, as Tim Dunne has put it, "an essential part of the narrative of late modernity."<sup>43</sup> The modern human rights regime was built in response to the atrocities perpetrated during World War II and gave birth in 1948 to the Universal Declaration of Human Rights, together with the Genocide Convention. From that point, a steady stream of human rights law was developed, none more important perhaps than the ICCPR,

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that have developed national legislation based on the Convention, is illustrated by the Al-Skeini case, heard before the UK Court of Appeal in December 2005. Baha Mousa died in UK custody in Basra, and the family accused British troops of having violated the European Convention on Human Rights and the UK Human Rights Act. The Court of Appeal concluded that because the UK was "exercising extraterritorial jurisdiction" the case could come before a UK court. See Roberts, "Transformative Military Occupation," 598–99.

41. Julie A. Mertus, *Bait and Switch: Human Rights and U.S. Foreign Policy* (London: Routledge, 2004), 211–14.

42. Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1993), 268, n. 9.

43. Dunne, "'The Rules of the Game Are Changing,'" 271.

the International Covenant on Economic, Social, and Cultural Rights, and the CAT.<sup>44</sup>

US moral authority was probably at an all-time high during that world war. Of all the wartime leaders, President Roosevelt was the most vigorous in mobilizing human rights as part of the war effort. His famous 1941 State of the Union address had promoted the “Four Freedoms”—freedom of speech and religion, and freedom from fear and want—as the essential qualities of a peaceful and democratic world. The Atlantic Charter, signed between Roosevelt and Churchill in August of the same year, described their desire to establish post-war peace on the basis of goals that would “afford assurance that all the men [sic] in all the lands may live out their lives in freedom from fear and freedom from want.”<sup>45</sup> American leaders’ association of their country with anti-colonialist sentiment, the well-springs of which came out of their own experiences with British rule, and their purported intention to remove all traces of European empire after the war’s end, similarly enhanced America’s appeal to nations seeking self-determination.

Slowly, that appeal began to wane because of the US failure to live up to these promises. The onset of the Cold War polarized the discussion on human rights and the discourse on rights became part of the contest between the two superpowers. Friends and enemies were determined not on the basis of “good governance” criteria—not a phrase that was even used during that period—but depended on national interest considerations in light of that ideological struggle. Atrocities accumulated on both sides, but the evidence of US violations during the Vietnam War, its support for brutal regimes in South and Central America, and development of training programs in the southern hemisphere and in South Vietnam that sanctioned highly coercive interrogation techniques, led to a steady loss of US moral authority, and of its capacity to lead by example.

However, recognition of that fact encouraged the US government and people to do something to redress it and to ensure that US proclaimed values and foreign policy behavior came more closely into alignment. The US Congress passed laws in the early 1970s making military and economic aid conditional on a country’s human-rights record. It also mandated the US State Department to set up a human-rights bureau and produce an annual report on rights practices in other countries. It constrained the operations of domestic intelligence organizations and investigated and uncovered the abusive practices with which the United States had become associated. The American electorate in 1976 voted into power a president who had decided to make human rights a central part of his electoral appeal. In his

44. The former two were opened for signature in 1966 and the latter in 1984.

45. See in particular, Elizabeth Borgwardt, *A New Deal for the World: America’s Vision for Human Rights* (Cambridge, Mass.: Belknap Press, 2005), Intro. and chap. 1.

foreign policy debate with the incumbent, Gerald Ford, Carter invoked on seven occasions the Chilean coup and subsequent violations of human rights by the Pinochet regime. Of course, these were developments that were primarily international rather than national in their orientation; but the Carter administration did sign some of the core human rights treaties, thus signaling that US behavior—on ratification of these treaties—would be subject to international scrutiny. Each of these factors helped the US recover some of its former status, despite the inconsistency in approach during the Reagan administration, which adopted policies that saw human rights protections retrench in Latin America, while abuses in the Soviet bloc received detailed attention.

Moreover, US standing was helped by the way the Cold War ended—relatively and surprisingly peacefully on the continent of Europe, although not always elsewhere. Many former members of the eastern bloc embraced the ideals of human rights and democracy. This suggested the triumph of a set of values that were associated with the West and certainly could not be associated with the communist world. US legitimacy was helped as well by the advent of a president in the 1990s who was willing to appoint credible people to head the bureau of human rights, to apologize for the US role in Central America,<sup>46</sup> to support the creation of the UN post of High Commissioner for Human Rights, and to sign onto the International Criminal Court (even if he realized that the US Senate was highly unlikely to ratify that action).

The decline in US authority has been much swifter and deeper during this present era, aided by the greater transparency in the system over the last two decades, more developed systems of accountability, and the place that the human rights idea has come to have in the contemporary understanding of the attributes of modern, legitimate, statehood.<sup>47</sup> The under-secretary for public diplomacy, Karen Hughes, on her travels learned of two factors that most damaged the US world image, the first being “perceptions of the mistreatment of alleged terrorist detainees at Guantanamo Bay and elsewhere,”<sup>48</sup> and the second America’s perceived reluctance to help bring into being a Palestinian state. This loss of legitimacy makes it difficult to

46. As President Clinton put it in 1999 during a visit to Guatemala after the publication of the Historical Clarification Commission report on that country: “For the United States, it is important that I state clearly that support for military forces or intelligence units which engage in violent and widespread repression of the kind described in the report was wrong, and the United States must not repeat that mistake.” Quoted in Sikkink, *Mixed Signals*, 181.

47. Foot, “Human Rights in Conflict,” *Survival* 48.3 (Autumn 2006): esp. 115–19.

48. FT Interview, “Bush Ally Hopes to Win over Islamic World,” *Financial Times* (15 Jan. 2007), 8.

advance US policy goals in several issue areas, not least in that of human rights, a policy realm that most frequently relies on processes of argument, exposition, and persuasion.<sup>49</sup> As one State Department official has put it, “how can we raise [human rights concerns] when the Bush administration’s policy is to justify torture?”<sup>50</sup>

Moreover, the depth of the decline also renders it problematic to see how the United States can recover its former standing. “Don’t do as I do but do as I say”—US exemptionalism—has become more difficult to accept, especially at a time when US policies are seen to have undermined world order, not to have sustained it. US Supreme Court judgments that serve to restrain the administration help but are not enough in themselves to rebuild US moral authority. Neither would a full-scale Congressional investigation have the necessary impact, because it would now most likely be viewed as a partisan act rather than an example of proper accountability. The resignation of Defense Secretary Donald Rumsfeld is not enough to turn the corner either because that resignation came not after the revelations of abuse at Abu Ghraib prison, not because of his statements that almost inevitably had dire consequences for the treatment of those in US detention facilities, but predominantly as a result of the military debacle in Iraq.

A new start, then, like in the period of the 1970s, would require a change of administration to one that recommitted the United States to the core elements of international humanitarian and human rights law. Indeed, it might also have to work to strengthen those laws in order to signal that the turn had had practical effects. It would also require repudiation of past US statements and behavior. More broadly, it would need implementation of a counter-terrorist policy that recognizes that the struggle against terrorism is not benefiting from an emphasis on military force and repressive techniques but instead requires the use of diplomacy, good intelligence, and of an international criminal justice system. Beyond the human rights area, it might require the United States to commit itself to other multilateral treaties, perhaps those connected with the global environment.

No doubt any advocate of a change in direction would also seek reinforcement for his or her argument from the language and ideas associated with exceptionalism. It is not hard to imagine what the terms might be. As Senator McCain argued in July 2005, using phrases typical of that tradition, and which also illustrate some of its pitfalls: “We are Americans, and we

49. A point made in Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995), 25–26.

50. Human Rights Watch 2006, quoted in Dunne, “The Rules of the Game Are Changing,” 281.

hold ourselves to humane standards of treatment of people no matter how evil or terrible they may be. To do otherwise . . . undermines our security, but it also undermines our greatness as a nation. We stand for something more in the world—a moral mission, one of freedom and democracy and human rights at home and abroad . . . The enemy we fight has no respect for human life or human rights . . . But this isn't about who they are. This is about who we are.”<sup>51</sup>

51. “Statement of Senator John McCain, Amendment on Army Field Manual,” at [http://mccain.senate.gov/press\\_office/view\\_article.cfm?id=150](http://mccain.senate.gov/press_office/view_article.cfm?id=150) (25 July 2005). McCain, however, put his signature to the 2006 Military Commissions Act, which permits evidence obtained through abusive means to be used in any trials of detainees.