U.S. Counterterrorism Policy and Superpower Compliance with International Human Rights Norms

Kenneth Anderson∗
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Abstract

Our specific topic is Guantanamo, but in my brief remarks I would like to take the long view of U.S. counterterrorism policy (including Guantanamo) and link it to the question of the compliance of the United States, as today’s superpower, with international human rights norms, its relationship to the United Nations and, speaking very broadly, international law norms as conceived by the international community. This is partly a question of the relationship of U.S. counterterrorism policy to international law. But it is also a question of the relationship of the superpower to the rest of the international community, and in particular to the United Nations (“U.N.”). I propose here merely to sketch out certain questions and possible answers. The inquiry I have in mind is frankly speculative. It makes assumptions about international politics that the reader might well find questionable. These remarks jump over those and many other hurdles in order to offer a big picture of the relationships between superpower status and compliance, on the one hand, and counterterrorism and international human rights norms, on the other. This version of the big picture may be quite wrong, but I persist in believing that it is necessary sometimes to try to see a big picture, if only to correct it. These topics require making certain assumptions about the nature of the superpower, its power, and the future of its power, among other things, that properly belong to the realm of international politics as much as law. A quick excursion through the political and foreign policy journals, the op-ed pages, and political commentary reveals, of course, vast disagreement on these questions. I spend more time than I should in Washington, D.C. at meetings of foreign policy experts and am struck with how different, and often mutually exclusive, the factual assessments of U.S. power are, even from people who share roughly the same political commitments, left or right.
SPEECH

U.S. COUNTERTERRORISM POLICY AND SUPERPOWER COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS NORMS

Kenneth Anderson*

Introduction

Thank you for inviting me to participate in this important discussion. Our specific topic is Guantanamo, but in my brief remarks I would like to take the long view of U.S. counterterrorism policy (including Guantanamo) and link it to the question of the compliance of the United States, as today’s superpower, with international human rights norms, its relationship to the United Nations and, speaking very broadly, international law norms as conceived by the international community. This is partly a question of the relationship of U.S. counterterrorism policy to international law. But it is also a question of the relationship of the superpower to the rest of the international community, and in particular to the United Nations (“U.N.”).

I propose here merely to sketch out certain questions and

* Professor of law, Washington College of Law, American University, and research fellow, The Hoover Institution, Stanford University. The brief remarks that follow were originally prepared for delivery to the Fordham International Law Journal’s Guantanamo Invitational Colloquium on November 29, 2006 that provides the material for this special journal section. They are deliberately speculative and a little provocative—aimed at fostering a discussion rather than offering a tightly argued, defensively closed position. I have opted to leave them as remarks, as prepared for oral presentation, and lightly footnoted, rather than converting them into a formal paper, because that informality seems best to suit their open-ended nature and to emphasize that I remain open to persuasion to different views on these matters.

These remarks have been revised following a presentation to the New York University Law School International Human Rights Colloquium, which took place on March 5, 2007, and my thanks to the invitation of Professor Philip Alston to take part and to the commentators on that program. Thanks also to Peter Berkowitz, Amanda Frost, Tod Lindberg, Scott Malcomson, Elisa Massimino, David Rieff, Matthew Waxman, Benjamin Witles, and Ruth Wedgwood for helpful conversations on the themes of these remarks, although none of them has any responsibility for the views expressed here and each of them would vigorously dispute many issues. Thanks also to The Hoover Institution and its director, John Raisian, for its support of my research work on these topics.
possible answers. The inquiry I have in mind is frankly speculative. It makes assumptions about international politics that the reader might well find questionable. These remarks jump over those and many other hurdles in order to offer a big picture of the relationships between superpower status and compliance, on the one hand, and counterterrorism and international human rights norms, on the other. This version of the big picture may be quite wrong, but I persist in believing that it is necessary sometimes to try to see a big picture, if only to correct it.

These topics require making certain assumptions about the nature of the superpower, its power, and the future of its power, among other things, that properly belong to the realm of international politics as much as law. A quick excursion through the political and foreign policy journals, the op-ed pages, and political commentary reveals, of course, vast disagreement on these questions. I spend more time than I should in Washington, D.C. at meetings of foreign policy experts and am struck with how different, and often mutually exclusive, the factual assessments of U.S. power are, even from people who share roughly the same political commitments, left or right.

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A Superpower—For How Long? Or A Multipolar World?

“Disagreement” is not precisely the term. “Profound unease” is perhaps better, because it better reflects uncertainties about the very meaning of U.S. power even within broadly partisan political positions. It is not that the right has one analysis, the left another, each side reasonably certain of its own position, while disagreeing with the other. My personal perception of Washington discussions today, on the contrary, is deep uncertainty gnawing at everyone, even if the uncertainties lead them in very different political and policy directions. How powerful, really, is the United States, particularly as demonstrated by Iraq and Afghanistan? How powerful, given the general sense of inability to use this supposed power to deflect Iran or North Korea from their nuclear courses? What difference does U.S. military might make if it cannot win its wars in the grand strategic sense, at least if the wars in question involve asymmetric warfare and counterinsurgency? What about the ability of the United States to affect internally generated crises that spill over to external
policy? As I write this, the wildly speculative, highly corrupt Chinese stock market has undergone (unsurprisingly) a correction.\footnote{On February 27, 2007, the Shanghai composite index fell nearly nine percent, the worst single-day drop in a decade, after reaching a 3,000-point milestone the day before. See David Barboza, A Shockwave from Shanghai, N.Y. TIMES, Feb. 28, 2007, at Cl.} This particular episode has thankfully subsided. But is this the kind of internal economic shock that, if strongly amplified, if severe enough, and occurring in a corrupt, authoritarian political system, could cause a political crisis that might even bring with it a disastrous confrontation in the Taiwan straits?\footnote{See generally NANCY BERNSKOPF TUCKER, DANGEROUS STRAIT: THE U.S.-TAIWAN-CHINA CRISIS (2005); see also Wendy N. Duong, Following the Path of Oil: The Law of the Sea or Realpolitik—What Good Does Law Do in the South China Sea Territorial Conflicts?, 30 FORDHAM INT’L L.J. (forthcoming 2007).} What kind of power does the superpower have to affect such a crisis of internal economic and financial making? Will the United States continue to have economic and military hegemony into the future, or will that dominance erode in the face of rising powers such as China? Will the world continue to be a superpower-dominated world, or will it shift into a mode of great powers or regional powers?

Perhaps the most important question is the last one: Are we seeing the end of the United States-as-superpower era that characterized the 1990s, and the emergence of a multipolar world? David Rieff, for one, argues that the emerging world is one of multipolarity, a world “in which China, the European Union, Russia and India will have as much say about global order as will the U.S.”\footnote{David Rieff, Concerts and Silly Seasons, OPEN DEMOCRACY, Feb. 23, 2007, http://www.opendemocracy.net/democracy-americanpower/concerts_4380.jsp (last visited Mar. 28, 2007).} Some argue, as Michael Lind does, that such a multipolar world fosters the happy emergence of what Lind calls a “concert of power” that would exhibit the useful virtues of power while constraining the tempting hubris of the superpower;\footnote{A concert of power, according to Lind, is a coalition or alliance of militarily and economically powerful nations that does not have a permanent enemy, but exists to decrease the likelihood of independent military action by one party against another. Lind advocates for “regional” concerts of power, rather than one global or universal concert of power. See MICHAEL LIND, THE AMERICAN WAY OF STRATEGY: U.S. FOREIGN POLICY AND THE AMERICAN WAY OF LIFE 171-88 (2006).} Rieff, for his part, attacks that idea, as well as the also \textit{au courant} idea of a “concert of democracies,”\footnote{See generally G. John Ikenberry & Anne-Marie Slaughter, Forging A World of Liberty under Law: U.S. National Security in the 21st Century (Final Report of the Princeton Pro-} as being little more than updated
versions of the same madness that animated the U.N. at its creation in 1945—the "preposterous fantasy," Rieff says, "that the great powers would ensure world peace through a military committee in which Russians and Americans would cooperate."6 Rieff concludes, quite rightly, that multipolarity, if it emerges as he predicts, "is by definition competitive. The idea that somehow the interests of great powers can be reconciled is no more reasonable today than it was in 1914, or, for that matter, in 1945."7

I have no special crystal ball as to the short or long term condition of U.S. power. Yet the nature of the discussion requires offering a view of precisely that. It is difficult to talk about what compliance by the United States as the superpower means without addressing the issue of its power: whether its power gives it special leverage; whether it has, or ought to have, special responsibilities and special prerogatives as the order-guaranteeing hegemon, or whether all of that is simply an illegitimate leap from power to status; and whether, and for how long, that power might last. Perhaps Rieff is right about the decline of superpower status and the emergence of a multipolar world. But in that case—if you accept, as I do, that Rieff is right that a multipolar world is by definition competitive—then compliance with international human rights norms becomes rather harder, not easier, to attain. I proceed in the remainder of these remarks on the assumption, however, that we deal in the short term at least with an on-going superpower, the United States, in order to ask what the relationship is between superpower status and compliance with those norms, in an age in which terrorism is a matter of serious concern to the United States and others. Rieff may well be right; I will, however, accept the continuation of the status quo of the United States as superpower as the basis for discussion about compliance and counterterrorism.

Given the United States as continuing superpower, we might put the question of superpower compliance with international norms in two ways. First, the issue can be conceived as a strategic question: What are strategies for getting the superpower to comply with a certain set of international norms, where we

7. Id. (emphasis original).
already agree as to the meaning of those norms, their fundamen-
tal interpretation, and with the proposition that the United
States ought to comply in the ways "we"—meaning that vague
reification called the "international community"—think it ought
to comply? I am willing to go partway down that strategic road
for purposes of discussion—but not all the way, because I proba-
ably have some important areas of disagreement as to the mean-
ing and interpretation of various norms. I assume that it is partly
because of those perceived disagreements, and the desire to put
them squarely on the table, that I have been invited to talk today.
I will therefore try to indicate some areas where I believe we dis-
agree—and the United States government disagrees—as to what
the norms at issue are and what they mean. Second, however,
the issue of superpower compliance can be framed as the ques-
tion of what is the relationship between the United States as the
superpower and the rest of the international realm, broadly con-
ceived—the international system, the U.N. system, international
law as "others" see it, international norms as the "international
community" sees them, and the "international community."

I am being deliberately vague about what the "others" are,
in part because I think it is a sliding concept, invoked as a figure
of opposition, a reification without a clearly defined point of be-
ginning or end. It is a constant trope to invoke the United States
against the rest of the world, and the rest of the world as against
it, but it is far harder to say precisely what "world" one means.
Once the binary division is examined in its particularities, in any
given circumstance, there is indeed a core opposition to the
hegemon, not just among the United States’ plain enemies, but
more importantly a core of deep opposition among those either
friendly in principle or at least not actively hostile. Yet there are
also many points of overlapping interest and shared values. It is
precisely the shifting and mixing of "now we’re with you" and
“now we’re against you” that creates a considerable part of the
tension—it turns opposition, on either side, into a sense of be-
trayal. Whereas with its enemies, the United States always knows
precisely where it stands.

2.

The Conjoined U.S.-International System

Another way of framing the superpower versus multipolar
world—one which offers some explanations—is through the familiar terms of classical international relations theory. That, in the hands of Morgenthau, or Waltz, or Mearsheimer, among others, each with his or her particular version of the story, tells us that the international system of States can be a condition of anarchy among States, or, under some circumstances, it might be dominated by a hegemon able to enforce a certain amount of status quo order. Classical international relations theory also offers various possibilities for what can happen to hegemonic order when that order is perceived as threatening—smaller States, feeling threatened or seeing opportunity, might band together at least temporarily to counteract the hegemon. Or the hegemon might exhaust itself internally. Or a new power might arise to challenge hegemony. There are many possibilities. I have no special idea where to place the United States today in such an array of realist paradigms. It does seem to me, however, contrary to pure realist international relations theory, that at least in the short to medium term, an analysis of U.S. power in the world must take account of at least the following “extra-realist” considerations:

- The role of values and ideological considerations in the world today, partly reflected around the ideology of human rights, but also increasingly around other ideologies, most powerfully political Islamism, but also in such ideologies as democratic authoritarianism à la Putin or Chavez. These ideologies carry independent causal

11. See WALTZ, supra note 9, at 114.
13. See MORGENTHAU, supra note 8, at 175-80.
14. See GILPIN, supra note 12, at 159-75.
15. See id. at 186-210.
16. See, e.g., CHRISTOPHER LAYNE, THE PEACE OF ILLUSIONS: AMERICAN GRAND STRATEGY FROM 1940 TO THE PRESENT 143 (2006) ("[I]n today’s unipolar era we should, and do, see others responding to U.S. preponderance by engaging in terrorism, soft balancing, opaque balancing, and semi-hard balancing") (citations omitted).
weight in the behavior of States, international actors, and sub-State actors that affect State behavior.

- The role of values and ideologies in U.S. politics, as with other large democracies, whether France or Germany, India or Japan. It cannot all be simplified to “material” State interests.\(^8\)

- The discernible reluctance in U.S. political culture to play the role of overt imperial power\(^9\) (leaving aside Latin America), even when Niall Ferguson or Michael Ignatieff thinks the United States should\(^10\)—a reluctance so considerable that it raises a question as to whether the term “hegemon” actually fits U.S. behavior.

- The long-standing response by other countries to the United States’ cultural reluctance to be an overt imperialist. That response—a crucial feature of the “international system” as it exists today—amounts to acquiescence in the U.S. security role; as Michael Mandelbaum correctly says on this point, other generally friendly States trust, not this policy, but rather the underlying cultural tendency—one which tends to revert to the cultural mean over time—against what realism might otherwise be thought to dictate. They therefore tacitly accept the U.S. security status quo, and think it worth more, with relatively few costs or demands for imperial tribute, than what such international institutions as the Security Council or international law or the international system construed without U.S. hegemony might offer.\(^11\)

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- A firm belief running across the partisan range in mainstream U.S. politics—Democrats as well as Republicans, liberals as well as conservatives—in some form of U.S. exceptionalism, an exceptionalism not based on the fact of power alone, but on a belief in its internal moral order legitimating a certain moral place in the world, however differently the partisan actors within U.S. politics interpret that exceptionalism. This may be folly, the “fantastic dogma,” that Rieff says it is, but I take it that he would grant, as a descriptive matter, that it accurately captures a deeply-held view of the U.S. political center.

- A U.S. belief—again, broadly held across the mainstream political spectrum, Democratic as well as Republican—that international law, norms, and institutions are to be treated and interpreted pragmatically, according to the “broad-minded” interests of a superpower interested in status quo order, stability, and the promotion of economic interconnectedness—and against, despite the rhetoric sometimes offered by Democrats, making a fetish of international law or institutions for their own sake. It is not the narrow and material self-interest of rising powers such as China—selling, for example, its Security Council veto for commercial gain in Sudan—but it is a view of the international system, the U.N., and international law according to pragmatic criteria centered in, not precisely sovereign State interest, but the broader interests of the democratic

many, many things in this book, but not on this point. Every time I make this point—a quite ordinary one in the minds of many states’ policymakers—I am told of all the many injustices and burdens and slights which the United States’ allies suffer as imperial tribute. Nearly all of them are frankly minor matters of politics and perception—few ever raise what might be thought serious economic tribute, e.g., the U.S. dollar status as the world’s reserve currency.


23. See Reiff, supra note 3.
souvereign State which also happens to be the superpower, and with a range of special considerations.  

All these bullet points, especially the last four, can be and are disputed. One might think matters were very much otherwise if all one were to consider, for example, was the debate in the Security Council over Iraq. But when one looks to the medium term behavior of States, I suggest that this description is reasonably close to the truth of how States actually, in fact, act today. There is a kind of equilibrium in which such structures as the U.N. and its norm-system, the international system, and the international State system—all these partially overlapping circles, operate with a certain weight and effect, while simultaneously being limited, not precisely by the power of the United States coercing or prohibiting them from acting, but instead by the preferences of significant actors, who prefer the implicit security order offered by the United States irrespective of the U.N., the Security Council, and the whole edifice of institutions and norm-structures giving rise to the ideal of collective security. They can loudly pay lip service to the international system precisely because they trust for their security elsewhere.

The existence of a hegemon offering security puts a limit on actually testing what the international system on its own might, or might not, accomplish if States overall had to look to it for security. Does anyone want genuinely to rest the Thucydidean “argument upon your safety” on the logic of collective U.N. security? There are populations who have no choice but to do


26. See Grant T. Harris, The Era of Multilateral Occupation, 24 BERKELEY J. INT’L L. 1, 38 (2006) (noting that states have both altruistic and selfish reasons for seeking the assistance of the United States and that the United States similarly prefers a multilateral approach to occupations).

27. See II Thucydides, History of the Peloponnesian Wars (Hobbes trans.) (1839); see also Michael J. Glennon, UN Reform: Platonism, Adaptivism, and Illusion in UN
that—the inhabitants of Darfur,28 for example, and before that, the men and boys of Srebrenica.29 There are also, to be fair, more positive examples as well evident in the relative successes of U.N. peacekeeping missions in recent years. But it is perhaps not surprising that a significant number of the world’s States, starting with Europe, have not, since 1945 (or even since 1990), been willing to test the naked proposition of collective security, fearing precisely the outcome that the international system so often amounts to—insincere promises and easy defection. As measured by their behavior at least, they prefer to trust, grudgingly, the superpower’s offer of an undemanding order over the uncertainties of collective action—so much so that they neither look to nor spend significantly for their own defense, but instead let the superpower do it. This does not stop everyone from loudly complaining, sometimes justifiably and sometimes not, about the superpower’s behavior. But the complaining is integrally part of the logic of insincere promising and insincere protesting. Likewise the attempt to bend the superpower to the will of smaller powers through a combination of ideological flattery (“you can be civilized like us”) or the ideological guilt trip (“we won’t love you anymore”).

One may, and indeed should, treat each individual dispute with the United States on its own merits, of course. My point concerning the relation of the superpower to the international system, the U.N. and its norm system, is a different one, and merely a descriptive observation of how the system works over time. The “conjoined system” of U.S. hegemony and the international system—and the United Nations in particular, as a place for countries (and international elites, non governmental organizations (“NGOs”)) and international civil servants, not just

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28. See Glennon, supra note 25, at 623.
29. Press Release, United Nations, In Montreal, Deputy Secretary-General Invites States to Give Greater Dynamism to UN to Protect World’s People from Danger, DSG/SM/211 (Jan. 22 2004) (noting that the U.N. has to be better at formulating collective responses so as to prevent mass killings such as those observed in Rwanda and Srebrenica); see also Henry F. Carey, U.S. Domestic Politics and the Emerging Humanitarian Intervention Policy: Haiti, Bosnia, and Kosovo, WORLD AFF., Sep. 22, 2001, at 72 (citing Richard Holbrooke as blaming the massacres at Srebrenica on the U.N.’s interpretation of the laws on the use of force).
countries) to get angry and let off steam while not intending, not really, to challenge the fundamental bases of that conjoined system (insincere protesting, again)—has, it seems to me, reached a fairly immoveable equilibrium. A lot of key players are invested in both the security and the protesting, invested in dependency and insincerity. If the question, therefore, is getting the superpower to go along with a set of norms defined by the international system, then it is relevant to consider the idea that the international system is not actually one of everyone profoundly frustrated and angry—certainly not to the point of actually changing it, or challenging the superpower by organizing against it materially rather than merely symbolically. Instead, it is what it has long been, a system in relatively stable equilibrium, in which the shouting, and the periodic amplification of the shouting, is part of how the system works over time.

Could all this change? Of course. The United States could gradually lose the economic power required to be the security-providing hegemon. Other powers could gradually arise, China, India, etc. The United States could gradually lose ideological steam to maintain its place in the system. The logic of collective security could start to look more attractive to key players currently under the U.S. security blanket. Risk assessments differ, too—Western Europe at this moment is worried about Russia and its energy supplies, which worries the United States far less than North Korea or China is, after all, to Europe, just a large market far away and unthreatening. All sorts of things can and will happen over time. But the system for now exhibits a certain stability, provided one sees it as a conjoined system. Key players, even when they protest, are also deeply invested in the system for their own reasons. Change, particularly change of norms, is not easy, because insofar as the norms are specifically part of the values of the international system, appeals for change inevitably raise questions of whether the participants are genuinely serious, or whether instead the exercise is mostly part of the international system’s (and especially the United Nations’) inherent cycle of insincere promising-insincere protesting-easy defection.

30. I reiterate, whatever that actually is; but I will take it on the terms that its proponents seem to intend.
3.

The Carnival of the New Liberal Realism

When one looks inside U.S. politics, across the spectrum of mainstream politics over time, by contrast, that politics is characterized by a sense of treating the international system, the U.N., and international norms in highly pragmatic ways—a sense of pragmatism far more broadly shared than the bitter arguments required by today’s theater of partisanship might superficially suggest. The differences are not entirely rhetorical. An administration of Clinton or Obama would behave with respect to the international system, and particularly the U.N. and its norm system, differently in some respects from an administration of McCain or Giuliani. But it is easy and tempting for many—wanting to make preferences into description and on the basis of heated rhetoric—to overstate the substantive differences. The mainstream center of U.S. politics does not fetishize the U.N. or international law or the international system.

Let me try to put this point about shared, rather than battling, views of the international system and international law within the U.S. political mainstream in a quite different way. Neo-conservatism is currently the intellectual whipping boy for all that has gone wrong, or apparently gone wrong, in U.S. foreign policy. Everyone today seems to be dreaming up new alternatives, at least in Washington, in universities, think tanks, and policy centers. I exaggerate, of course, but for the moment, at least, “everyone” seems to agree that (conservative) idealism is the problem and today we all, conservatives and liberals, but particularly liberals, seek to distinguish ourselves from neo-conservatism, by turning ourselves into realists for a good while, just as we should have remained realists after 9/11, particularly about Iraq. We should have, on what we might call the “new liberal realism,” accommodated to Saddam and his sons; we should have continued to seek containment instead of removal.

Indeed, containment and accommodation, and the return to an entirely instrumental balance of power politics that disregards the nature of the regime and its rulers appears to be the new order of the day with respect to pretty much every bad regime; the only regime, apparently, that cannot be accommo-

32. See Rieff, supra note 3, at 1.
dated in the new liberal realism is the Bush Administration. One can represent that attitude as merely a realist bow to the fact that in Iraq the United States has had its nose rubbed in the limits of what military action alone can get you in the way of cultural change and what it cannot; still, the new liberal realism represents a more profound disillusionment than that, more than just a disillusionment with military solutions to problems, but a disillusionment with muscular idealism as such.

By "muscular idealism," I mean a very particular and unattractive feature of the new liberal realism. It is realism insisted upon with respect to actions by the United States as a democratic sovereign State. What, after all, was the idealism of the Bush doctrine? It was the Bush fils repudiation of the Bush pere balance of power realism among authoritarian, corrupt, and murderous dictators in the Middle East, on the grounds that this "realism" was a core part of what set the terms for 9/11. That idealism is shoved aside in the new liberal realism. We are offered instead the canonization of James "No Dog in this Fight" Baker by—God help us all—U.S. liberals. Yet although the United States is now supposed to be governed by the hard requirements of realism, the new liberal realists nonetheless want to have their cake and eat it, too. They want to claim not to have lost their idealism. Their idealism, however, is now relocated to the place least likely to bear any idealist fruit—the proven ineffectuality of the international system. Assert one's idealism through the U.N. and one's allies—well, it is unlikely to be tested in action, because it so rarely gets that far. The idealism of the international system is impeccably credentialed idealism and a practical guarantee of ineffectiveness. Meanwhile, the idealism of democratic sovereigns—which, in regard to muscle, means the United States—is henceforth to be governed by the propositions of realism.

This gets it exactly backwards, to be sure—but it does so in a way that allows the new liberal realists to claim, fantastically, both labels at the same time. Among realists, Rieff, however, stands alone because he, at least, does not demand to have it both ways.

33. I refer to Baker's famous—infamous, then, in the eyes of idealistic human rights oriented liberals—formulation of why the United States should stay out of the Yugoslavian conflict in the early 1990s. See Jonathan Eyal, It Was a Test Case, And America Failed, INT'L HER. TRIB. Apr. 15, 1992; see also John O'Sullivan, West Could Have Stopped Milosevic, CHIC. SUN TIMES, Mar. 14, 2006.
And he is one of the very few—if not the only one—who has honestly acknowledged that he has, in fact, *changed his mind.* Should not the new liberal realists, if they are as honest as Rieff, do the same, rather than claim to have it both ways?

The new liberal realism is profoundly unattractive—as though liberal idealists, long constrained by their moral Calvinism to worship at the altar of severe Wilsonian idealism, were suddenly freed, through the failure of conservative idealism, the failure of neo-conservatism, to celebrate a Carnival of realism, *petit moralistes,* catechists of the Categorical Imperative, until now sternly watched over and instructively smacked on the head to prevent dozing off in the Church of Human Rights by people like Michael Ignatieff, Kenneth Roth, Samantha Power, Geoffrey Robinson, Jimmy Carter, Claire Short, Louise Arbour, the seminarians of human rights idealism suddenly freed to dance drunk in the avenues of dubious virtue, to party in the sinful precincts of hard realism usually reserved to the morally benighted Brent Scowcroft and James Baker, freed to expound on the virtues of accommodation, containment, stability, and interests, freed to expatiate realist necessity, game theory, instrumentalism, rational choice; freed not to have to sing hosannas at every waking moment to the glory of Moral Ends and Human Rights Universalism, and freed to maintain the necessity of “our sonofabitch.” Think Wilber Luce on a drunken bender.

I also do not think the Carnival will last. Liberals and democrats in the United States will sober up and rediscover—the sooner the better—that they are committed long term to certain values that will require means *actually* (and not merely rhetorically) adequate to pursue them. The means of that idealism will have to be something more effective than the “international system.” The targets of that idealism will have to be more than simply going after the Bush Administration, which, in any case, will not be around that much longer. But essential to understanding

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34. *See David Rieff, At the Point of a Gun: Democratic Dreams and Armed Intervention* 7 (2005) (in the introduction, the author notes that the book is “an argument against [my] previous conviction that humanitarian military intervention, whether to alleviate massive suffering or rectify grave human rights violations, should be a norm that a Tony Blair or, indeed, a Kofi Annan seems to believe it either has already or should become in international relations”).


the long-term center of U.S. foreign policy is understanding how much of neoconservatism is part of that long term center, and part of the ideals even liberals espouse, or will again one of these days. Walk through Francis Fukuyama’s After the Neocons.37 It offers a useful critical guide to the underlying propositions of neoconservatism, and what you will find is that most—not all, but most—of them will show up again in idealisms of both right and left in the United States, even if under other names, because there is an irreducible idealist strain in U.S. foreign policy that will not go away.38

The point is this: The United States’ superpower status is irretrievably bound up in its own mind, in its political center, in its mainstream politics, both Democratic and Republican, with the moral legitimacy of that power. One may scoff at that, shudder even, think it supremely hypocritical, accept it as the fact of power without legitimacy, regard it as an exercise in gross wickedness, etc.—but it would be a profound mistake to imagine that a change of administration in the United States will deeply alter that internal perception. Superpower emphasizes “power.” U.S. politics, by contrast, even with the bitter debates over the morality of U.S. actions in the world from Guantanamo to Abu Ghraib, emphasizes U.S. legitimacy. A new Democratic administration is unlikely to draw from the experience post 9/11 that the United States is a superpower by reason of power alone, but instead the quite different lesson that it has to clean up the moral mess of the Bush Administration in order to continue what it, along with the U.S. “vital center,” has long seen as the legitimate international moral order—a flexible, pragmatic international system that consists of a sometimes messy, sometimes inconsistent, fundamentally conjoined United States-international system. In the collective mind of that U.S. vital center, the international community, the U.N., international law are not—as they are for

38. Id. I highly recommend the Fukuyama book. I have written two reviews of it, and as time goes by, I have decided that those reviews are actually too harsh. It is a very insightful book, not just for its dissection of neoconservatism, but for its attempt to sketch a future foreign policy. For the short review, see Kenneth Anderson, Doomed Internationalist, TIMES LITERARY SUPPLEMENT (LONDON), (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=940309. The long version, with a lengthy discussion of multiculturalism and terrorism, and also a much more developed discussion of the “new liberal realism,” appears as Kenneth Anderson, Goodbye to All That? A Requiem for Neo-Conservatism, 22 AM. U. INT’L L. REV. 277 (2007).
some on the U.S. right—irrelevant. Just as they are not—as they are for some on the U.S. left—overriding. It is a messily conjoined system.

If all that is even approximately so, the question then becomes, what is the status and role of international human rights, particularly as understood and interpreted by the human rights movement, Western European governments, and international bodies, for new, post-Bush Administration regimes in the United States, in a continuing U.S. claim of “superpowerness” that also asserts legitimacy? The U.S. political center partakes directly of a central proposition that Fukuyama identifies with neoconservatism, but would be better understood as a central proposition of all mainstream U.S. political idealism about the international world—the conjoined U.S. belief in both the legitimacy of the exercise of U.S. power as a force for generally good order in the world, and the U.S. exceptionalism that goes along with that. Perhaps I am wrong, but I do not suppose that this fundamental internal perception, held across the U.S. political spectrum, has been altered for the long term, even by the reign of the Bush Administration.

4.

Interpreting Human Rights Norms in the War on Terror

Given the concept of a conjoined system, it is perhaps easier to understand, from the view of the U.S. political center, that arguments from human rights proponents neither fall on deaf ears nor automatically win the day. It would be a logically more coherent, but politically less satisfying, system if it were all one or the other. But even within the arguments over human rights norms and United States compliance with them, it would be a mistake to assume that there is complete or automatic agreement over what those obligations are, what they mean, how they are to be interpreted, and whether and to what extent the United States is actually out of compliance with them since the beginning of the U.S. war on terror. There is not.

The war on terror is central to the debate over the compliance of the superpower with human rights and humanitarian law norms because it goes to the heart of the values debate. That

39. See generally FUKUYAMA, supra note 37.
values debate is often framed as though it were between moral values and merely prudential claims of security. Security is a core value of any political community, however, no less so than individual human rights. Moreover, the wickedness of terrorists in attacking civilians is not simply a matter of a political community prudently protecting itself, but also of fighting against evil and wrongdoing. At issue, in other words, are values on each hand, which act as yet another reason why the question of counterterrorism is central to the question of superpower compliance.

That said, I am going to skip over all the various ways in which the United States is claimed to be in violation of various human rights standards, including law of armed conflict standards. I am likewise going to skip over as well all the various views and responses of the United States in reply. Those debates have been stated and re-stated; I will simply say that, in general, I share the legal views of John Bellinger. His view, roughly summarized, is that international law is considerably more complicated than many critics of the United States have made out—which is to say, he restates the traditional U.S. view


41. In response to accusations of human rights violations at Abu Ghraib and other detention centers going beyond individual violations by individual soldiers to reflect a systematic policy of the Bush Administration on torture and mistreatment of battlefield detainees, then-White House spokesman Scott McClellan said in 2005:

I think the allegations are ridiculous, and unsupported by the facts. The United States is leading the way when it comes to protecting human rights and promoting human dignity. We have liberated 50 million people in Iraq and Afghanistan. We have worked to advance freedom and democracy in the world so that people are governed under a rule of law, that there are protections in place for minority rights, that women’s rights are advanced so that women can fully participate in societies where now they cannot.”


42. A convenient place to get some of those views summarized is at the Opinio Juris Blog, where Bellinger guest-blogged during several weeks in January 2007—a quite remarkable exchange of views between Bellinger, a number of guest respondents from the international law community, and many, often highly erudite, commentators. See Roger Alford, Opinio Juris Welcomes State Department Legal Adviser John Bellinger, OPINIO JURIS, http://www.opiniojuris.org/posts/chain_1169503291.shtml (last visited Apr. 1, 2007) (Bellinger’s guest blogs are included on this web page).
that international law is much more flexible and pragmatic and able to be shaped to new circumstances, including transnational jihadist terror, than many critics of the Bush Administration have been willing to admit.\footnote{See John Bellinger, \textit{Wrap Up Discussion II}, \textit{Opinio Juris} (Jan. 25, 2007) \url{http://www.opiniojuris.org/posts/1169777773.shtml} (last visited Mar. 31, 2007).} I do not join Bellinger at every turn—after all, he is in the position of defending the Administration at every turn—but I agree wholly with that basic starting point.

I do join with the Administration's critics, however, in saying that the war on terror does not, in fact, meet the requirements to constitute a war in the \textit{legal} sense as such, any more than the Cold War was for forty long years a war in the legal sense to which, at every moment and in every encounter, the laws of war applied.\footnote{That said, it is also important to recognize the undeniable strength of the Department of State's view that once the trigger of war is pulled in a legal sense—as happened on 9/11—a hiatus in attacks does not mean it is switched off again. The view that once war is legally "on," it runs until it is definitively over is a powerful argument, undeniably so.} That was not how the United States understood the concept of war and the law of war in the Cold War. And it seems to me that we should adopt the same understanding now—a strategic sense of a long struggle, usefully understood and analyzed as war, but not across all time and in all places constituting a legal armed conflict. I understand and sympathize with the impulse to treat it that way in the period immediately after 9/11—but, five years on, I do not think it meets the legal tests as a whole, global enterprise at this point, and there is relatively little to be gained today by insisting that it does.

The U.S. Government, the Administration as well as Congress, has begun tacitly to recognize this, evidenced, for example, by the way in which the Military Commissions Act of 2006 ("MCA")\footnote{See \textit{Military Commissions Act of 2006} ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600 (2006).} defined various terrorist offenses. The MCA, for example, relies increasingly not upon the international law definition of a combatant—one who takes active or direct part in hostilities\footnote{Under Protocol I of the Geneva Convention, combatants are all organized armed forces, groups and units which are under a command responsible to a Party to a conflict, even if that Party is represented by a government or an authority not recognized by an adverse Party. \textit{Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Pro-}}
port. Those latter concepts—and related concepts of conspiracy, etc.—are the relevant concepts for conducting effective counterterrorism—but they are not fundamentally concepts of the law of war. They are instead, rather, concepts of a sui generis domestic legal regime of counterterrorism, about which one may raise important questions of its interaction with norms of international human rights.

What I particularly share with Bellinger, however, is a view that Bush Administration critics are far too quick to boldly assert, in nearly every instance, that the Administration is in violation of international law and human rights and humanitarian law norms, as though in all these cases the meaning, applicability, interpretation, etc., of those norms were transparent. I understand the critics taking the moral high ground in the face of the torture memos, the initial insistence of the United States that the Geneva Conventions did not apply to what the United States itself termed as war as a legal matter, among other things. On the other hand, I am unwilling to turn around and say, well, from now on the critics’ views of what these norms mean controls over those of the U.S. Government. I entirely share, for example, the State Department’s long-held views of the territorial application of the International Covenant on Civil and Political Rights (“ICCPR”). I do not think the Torture Convention is self-explanatory as to what actual, concrete behaviors constitute torture; the Convention does not come with a user’s manual to what actual Central Intelligence Agency interrogation practices constitute torture. Someone has to interpret these things,

tocol I) art. 43, opened for signature June 8, 1977, 1125 U.N.T.S. 3. Civilians enjoy general protection against dangers arising from military operations unless and for such time as they take a direct part in hostilities. Id. art. 51. The United States has always—and correctly, in my view—declined to join Protocol I, but it does not dispute the fundamental definition of a combatant noted here.

47. MCA § 950v(b)(24).


and while one can have long legal arguments regarding who and in what fora, more important to me in this discussion is that a large part of the argument lies not solely in the substance of such questions, but instead in how international norms are conceived in the first place. Is there room for the pragmatism and flexibility that the United States (and not the United States alone) has traditionally taken to be inherently part of international law and its application? Notably missing from the discussion, after all, is the possibility that, given the inherent ambiguity of at least some of these norms and their meanings, their interpretation and meanings are being formulated in some part by the state practice of the United States itself.

5.

The Future of Counterterrorism and Human Rights Compliance

For all the importance of these questions, I do not propose to pursue them further in these brief remarks. They are vital questions of practice today, accountability for practices in the past, yes—but what concerns me far more at this point is what the relationship of international human rights and U.S. counterterrorism policies should look like into the future. Part of the intractability of counterterrorism policy as a political debate in the United States today, at least, is that everyone is highly invested, either as critic or defender, in past practices and arguments over past practices. This makes it difficult, sometimes impossible, to look forward to what counterterrorism policy ought to be. No one can propose or admit a change from what they have done or criticized having been done in the past without a damaging admission. While the possibility of a change of U.S. administration, Democratic or Republican, offers a chance to reformulate and re-conceive basic counterterrorism policy, that is unlikely to happen unless at least part of the debate refocuses on the going-forward.

Let me therefore suggest, in rapid fire, bullet point form, what some basic points of a reformulated, forward-looking counterterrorism policy might be, and how it might relate to questions of compliance with human rights norms. I leave

50. I draw here in part from a very interesting exercise sponsored by the Stanley Foundation as part of its Bridging the Foreign Policy Divide project—bringing together
aside the Iraq war altogether in this; I regard it as Joe Lieberman does, as an integral part of the war on terror, but I understand perfectly that this view is far from universally shared. First, we might conceive comprehensive counterterrorism policy on a continuum with the two extremes:

- **The role of war.** War has two distinct roles to play in counterterrorism policy. War is a critically useful strategic paradigm for understanding the long term struggle against Islamist terror, just as it was in the Cold War. It is, for one thing, how our opponents conceive of the struggle, its purposes and future. It is the strategic prism by which we can make decisions about offense and defense, a home strategy or a forward one. Actual war in counterterrorism, however, war that meets the strict legal definition of war—especially the large scale use of military force—is not usually about fighting the terrorists themselves, since they melt away into the background (Afghanistan and Pakistan are the exception.). It is more typically about fighting regimes—those that offer safe haven, on the one hand, or those that threaten to provide terrorists with weapons of mass destruction, on the other, on whatever criteria of threat assessment a chastened post-Iraq war policy deems advisable. War, both actual war and war as a strategic metaphor, is an essential tool of counterterrorism policy—but not all counterterrorism policy is war, either. Actual war is one extreme, aimed mostly against regimes.

- **The role of law enforcement.** If actual war represents one extreme in the continuum of counterterrorism policy, the other extreme is traditional law enforcement and the application of the traditional domestic criminal law. On the one hand, there is obviously a large role for law enforcement in counterterrorism, especially domestically, and in cooperation with law enforcement abroad. On the other hand, as Judge Richard A. Posner, Michael Scheuer, Andrew McCarthy, and many others have written, there can...
be no return to the 1990s Clinton-era reliance upon post-hoc law enforcement as the primary means of counterterrorism policy.\footnote{52} The Moussaoui prosecution, to take one prominent example, cannot be counted a success in counterterrorism, much less a model.\footnote{53} Traditional law enforcement has a role, but it cannot be the core of counterterrorism policy either for intelligence gathering or enforcement/prevention.

If actual war, and likewise law enforcement, too, are limited as means of counterterrorism, the question is what lies in the broad middle ground between those two? I ask this partly for its own sake—what should counterterrorism look like to be successful as a \textit{whole} enterprise? In the context of this discussion, however, I mean specifically to ask what relationship this (as yet unspecified) middle ground has to human rights norms. After all, the relationship of law enforcement, criminal justice, the criminal courts, to human rights norms is not fundamentally at issue, despite various arguments at the margins. For that matter, too, when it comes to actual war, the laws of war (while subject to intense debate as to what it means when applied to situations not obviously about war or battlefields in the ordinary, traditional sense) are probably the most worked-out, refined set of rules in all of international law. The two extremes of the counterterrorism spectrum are not really the human rights issue—whereas what lies in the middle is the issue, precisely because so much of it is unspecified and undefined.

Counterterrorism in the abstract consists of gathering information on terrorist threats and then acting to prevent them. The human rights issue of what this broad middle ground of counterterrorism policy comprises, that which is neither war nor criminal law enforcement, begins with questions of what law applies to it (or to any particular part of it), and how that law shall be interpreted, by whom and in what fora. Although some have


\footnote{53} See Jerry Markon, \textit{Martyrdom for Moussaoui?}, WASH. POST, Apr. 5, 2006, at A9; \textit{see also} Editorial, \textit{Moussaoui Trial No Triumph for Prosecutors}, CHATTANOOGA TIMES FREE PRESS, Mar. 25, 2006, at A4 (describing how prosecutorial mistakes at the Moussaoui trial send an international signal that compromises counterterrorism efforts).
called for new international law regimes to address terrorism and counterterrorism—a new Geneva Convention, perhaps, or a new treaty, new treaty law is neither wise nor likely. States cannot agree on so much as a definition of terrorism, let alone substantial counterterrorism rules. More prudent and more likely, instead, is the development of domestic law legal regimes, conditioned by international law of human rights. But disagreements over the nature and application of these obligations promise many, many disputes.

Some of the “middle ground” issues are presumptively not hugely troubling from the human rights norm standpoint. These include such things as efforts to disrupt terrorist financing or information sharing among foreign intelligence services, and I will leave those aside. But others, framed as a domestic legal regime of counterterrorism, raise deep civil liberties as well as human rights issues, even as they are, I suggest, necessarily core parts of a forward-going counterterrorism policy for a new administration, whether Democratic or Republican:

- Surveillance issues: what is legal, what is not, and who must review and approve decisions.
- The status of intelligence and other agents and their actions on foreign soil, either with knowledge and permission or without.
- Detention decisions: who makes them, and how they may be challenged.
- Interrogation and what constitutes cruel, inhumane treatment, etc., and the legal line of torture.
- Secrecy decisions—an overlooked aspect of counterterrorism policy—long present but now sharply at the forefront of counterterrorism policy is the whole legal and administrative structure of classified information.
- Decisions to release (or not release) terrorist suspects, when, and to whom; rendition questions; the

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(un)willingness of governments to take back their nationals; and the possibility of indemnification for mistaken detention.

- How to try detainees for alleged crimes, by whom and under what legal regime and in what fora with what legal protections.

- The use of force (short of the legal definition of war) in assassination, abduction, detention, destruction of terrorist materiel, etc.—what law applies to regulate this conduct and what should the substantive standards be?56

Under a forward-looking counterterrorism policy, these will figure prominently among the many issues for which superpower compliance with international norms is debated. For some of these, at least, I can suggest some answers.

- A civilian national security court. My view is that it is time to create a national security court, with judges drawn from the existing circuit courts, civilian in nature, with special rules for procedure, evidence, and so on. The United States could usefully draw upon the experience of Western Europe with regards to national security courts and special counterterrorism laws.57 The rules of the international criminal tribunals which in, for example, the case of the Yugoslavian tribunal permit wide latitude with respect to hearsay and other evidence, are also instructive. Such a court would have at least two separate roles. First, it would take over from the military in any military commission cases determining guilt under any MCA-type prosecution. Second, it would, ideally, serve as the forum periodically to review the factual basis of, and ongoing need for, what should amount to legislatively defined administrative detention in other cases. The military, for its part, should be limited to dealing with detainees taken on battlefields as ordinarily defined in the legal definition of war. (This would not, however, eliminate all instances of military detainees at Guantanamo, however, many of whom were


taken on battlefields as ordinarily defined in the laws of war.\textsuperscript{58}

- \textit{Close Guantanamo.} I do \textit{not} say this as one of the Administration's legion critics; I supported its creation and think that it served a useful purpose from the outset of the war on terror. Nor does this mean releasing the so-called handful of high-value detainees—Khalid Sheikh Mohammed, \textit{et al.}—but they are a tiny handful of the total. At the same time, I simply urge dropping the criminal charges now lodged in military commissions against several score Guantanamo detainees, and releasing them. (The complications of repatriation to countries, such as China, that might mistreat them, or to countries, including Britain and Germany, that in some cases do not want their nationals back, even as they bitterly criticize the existence of Guantanamo detentions, are left aside here.)\textsuperscript{59} Near total release of the Guantanamo detainees is not as morally clean as it might seem to those for whom Guantanamo detainees consist entirely, or almost entirely, of innocent shepherds sold by the Northern Alliance. Some of the detainees—Hamdan himself, for example, given his admitted role—are indeed worthy of detention and punishment as part of al-Qaeda. Others were taken in what appear to be relatively clear cut violations of the laws of war on a traditionally defined Afghanistan battlefield. Moreover, as one Defense Department source remarked to me off-the-record, if we do let the detainees go \textit{en masse}, the result is likely to be at least some additional people killed, as at least some of these people over time return to the fight. On the other hand (continued this source) the dead are more likely not to be U.S. citizens. Finally, closing Guantanamo, whatever the public relations value of doing so, does not remove the fundamental point that, without question, the United States will continue to detain people in counterterrorism; and it needs a policy for dealing with detentions post-Guantanamo. Bringing detainees into the regular U.S. criminal justice system is an enormous mistake, and so closing Guantanamo only makes sense in the

\textsuperscript{58} It is noteworthy that the lead defense counsel for Hamdan against the U.S. Government, Georgetown Law Professor Neal Katyal, has endorsed the idea of a national security court. \textit{See} Stuart Taylor Jr., \textit{The Case for a National Security Court}, NAT'L J., Mar. 26, 2007.

context of a new, comprehensive counterterrorism court and legal regime—not a very likely prospect, of course.

- Institutionalize comprehensive counterterrorism policy through legislation, and require Congress to share ownership of it. One profound effect of the Cheney faction’s focus on executive power within the Bush Administration has been that it has let Congress off the hook in having to take, and share, responsibility for U.S. counterterrorism policy. So long as the Bush Administration is willing—masochistically—to take all the heat, in the name of protecting executive power, for every counterterrorism policy, for all of it, Congress will not easily on its own step up and accept responsibility for any of it. And the Bush Administration, even as its term of office runs to a close, seems oblivious to the advantages of institutionalizing counterterrorism policy through legislation that will be around long after the Administration is gone. The Administration seems oblivious to the fact that what lives by executive discretion also dies by executive discretion—and if counterterrorism is as important as the Administration says it is, and in the specific ways it says, it ought to seek to make its counterterrorism policy the permanent policy of the United States through legislation. I obviously have strong views on what counterterrorism policy should be; still more important is that, in a democratic system, the legislature share and enact such policies for the long term, whatever they substantively happen to be.60

These and other domestic legal measures will raise important questions of the application of international human rights norms. Much of the human rights debate up to this point has taken place in the context of the application of the laws of war.61 If counterterrorism policy were reformed along the lines I suggest, however—with a concomitant emphasis on civilian, rather than military structures—some part of the discussion naturally would shift away from the laws of war toward the specific application of human rights law with respect to such practices as administrative detention. There would be, unquestionably, many disputes over the applicability, interpretation, and flexibility of

human rights norms. On many of those issues, the United States has strong and long pronounced views; I do not suppose there would be much agreement forthcoming in those debates.

But even in the midst of those debates, I would caution, once again, that while there are indeed differences in how a Democratic administration would view these matters from how a Republican one would, those differences are less than might be thought. Perhaps, for example, a Democratic administration would reverse the course of decades of U.S. views on the territorial application of the ICCPR and treat it as applying extraterritorially—thus giving at least an arguable international human rights purchase for example, in the case of the use of force by the United States abroad short of war, for example, in abductions or assassinations. Or perhaps a U.S. judge might be willing to do so.

But, for what it is worth, I rather doubt a Democratic administration would do so. A return of the Democratic Party to the presidency would require Democrats to take ownership of counterterrorism in ways that they have not so far had to do, given the willingness of an executive-power obsessed Bush Administration to treat practically all of the war on terror as an exercise in pure executive discretion—and so taking all responsibility for it. We have yet to see how a Democratic administration and Congress would conduct counterterrorism if policy truly belonged to them.

6.

The Meek Multilateralist?

Insofar, therefore, as many of the burning issues of U.S. compliance with human rights norms today have to do with the war on terror, there are possibilities in the future that might better satisfy human rights critics of the United States while still satisfying U.S. security concerns. Not on everything, and not necessarily as the critics might like. Still, if the attention could be focused at least partly forward and not entirely backwards, there are possibilities for restructuring counterterrorism policy that would even satisfy someone like me (who, at the end of the day, supports the Bush Administration's overall policy), while at least partly satisfying human rights critics. Maybe, maybe not. Let me
close these remarks, however, with a consideration of a quite different sort.

Conventional wisdom seems to be that the United States has quite exhausted itself with war—perhaps not unlike its exhaustion with war following Vietnam. Not everyone shares that view, but conventional wisdom says no more wars for a good while. From the European point of view, that does not make the U.S. security guarantee any less good, but rather better because, for Europe, U.S. counterterrorism wars simply stir up Islamist terrorists in Europe's own cities, places that cannot be attacked by the 82nd Airborne. What such exhaustion most likely leads to is a return to the policies and, more precisely, of the sensibilities, of the early Clinton era, perhaps with an added air, in a Democratic administration at least, of contrition for the wicked Bush years. It is a sensibility expressed to the considerable satisfaction of Western European allies, as "meek multilateralism."

But recall what that "meek multilateralism" served in those early Clinton years. It was a "get along, go along" foreign policy not really interested in anything foreign other than trade. It was willing, most of the time, to say all the right multilateralist things because the Clinton Administration came to power by promising to focus on domestic issues. It was always willing to feel everyone's pain for anything out in the world. But it was much less willing to act. It wanted to be multilateralist precisely in order (partly, but only partly, through lip service compliance with all those international norms), to try and be just another power in the multilateral gaggle of nation states—whose compliance, after all, is partly just lip service, too.

But just being one of the guys, so to speak, doesn't work for the United States, of course. And it doesn't work for the rest of the world either. What? Really, really rely on the promise of collective security through the U.N.? Who are we kidding? Within a few years the Clinton Administration was in a different

62. For example, Ivo Daalder and Robert Kagan, two prominent foreign policy analysts of the center left and right, respectively, are releasing a joint paper arguing that the United States will be no less bellicose in a new administration than under Bush. See Ivo Daalder & Robert Kagan, America and the Use of Force (Stanley Foundation, forthcoming 2007).

63. See Juan J. Walte & Marilyn Greene, U.S. Policy From Sea to Sea, USA TODAY, Dec. 17, 1993, at 11A.
mode—but it wasn’t willingly, and it wasn’t for lack of desire to loom small on the world stage. We therefore face, under either a Democratic or Republican administration, the possibility of a return to a form of meek multilateralism by the United States. It might actually be more compliant with international law norms. It might be much more respectful of international law as the international law professors see it. It would almost certainly be more soothing to the sensitivities, so offended by the Bush Administration, of the international community. One might wish that the United States would essentially submit its power to supervision and control by its allies and friends and take instruction from them, but that seems unlikely. the much more likely scenario is talking a humble, virtuous talk—and passivity as much and as long as possible.

The actual choice is much more likely this: On the one hand, a meek multilateralism that masks a deep desire to ignore, at least for some quite possibly critical years, the responsibilities and obligations of the superpower, in order not to be seen to be exercising its privileges, and also, frankly, to lick its wounds. Or, on the other hand, the robust assertion of U.S. exceptionalism, even to the point of special privilege, arrogant as that always in fact is, and infuriating to the rest of the United States’ friends and allies as that always is, and less compliant and respectful of others’ views of international law and the international system.


65. One reason is that, although the United States is fully capable of moral and legal mistakes, submitting one’s power to the supervision even of one’s friends invites—quite apart from its preposterousness from a strictly realist standpoint—the “give a mouse a cookie” problem, the inevitable tendency to demand more and more of the superpower as a condition of continuing to like it. I leave aside here, as too large a topic for these remarks, the currently popular idea of a “caucus of the democracies” that might provide a robust yet less evidently insincere forum in which the United States could argue its views, find greater grounds of agreement, and generally have a place among those who share its fundamental values against which to check its own behavior and achieve some agreement and coordination. See Huntley, supra note 26 (calling for the institutionalization of global democratic dominance); Kenneth Anderson, United Nations Reform and the Agendas of Human Rights and Democracy 10-11 (Sept. 30 2005) (unpublished manuscript), https://www.law.georgetown.edu/internationalhrcolloquium/documents/UNreformHRGeorgetown7Oct05.doc (last visited Apr. 11, 2007); see also Council for a Community of Democracies, A Community of Democracies: The Evolution of A Movement, http://www.ccd2l.org/team/index.htm (last visited Mar. 31, 2007) (discussing history and development of the Community of Democracies); Ikenberry & Slaughter, supra note 5.
such as it is. The latter choice may not rise, in a new administra-
tion, to the Bush Administration’s specially calibrated levels of bellicosity, but it would not be a return to the early 1990s, either. Think carefully upon which you prefer.