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### Iraq and the Future of United States Foreign Policy: Failures of Legitimacy

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# IRAQ AND THE FUTURE OF UNITED STATES FOREIGN POLICY: FAILURES OF LEGITIMACY

Henry H. Perritt, Jr.\*

## I. INTRODUCTION

Recently, I published a law review article, "Structures and Standards for Political Trusteeships," which sought to draw lessons from international interventions in Bosnia, Kosovo, East Timor, Afghanistan, and Iraq.<sup>1</sup> The article offered a number of "prescriptions" for success in such "political trusteeships."<sup>2</sup> Enough time has passed, since the United States attacked Iraq seeking "regime change," to permit a focused assessment of the Iraq venture according to the prescriptions offered in the earlier article. This article evaluates the political trusteeship in Iraq, and concludes that the United States failed to apply many lessons that the international community learned from preceding political trusteeships, and that the result is likely to be a serious unraveling of important, though intangible, sources of leverage for U. S. foreign policy and national security.

It would be a mistake, however, to overlook the positive aspects of the Bush Administration's Iraq intervention. On the whole, the Administration did poorly in seeking and creating international legitimacy for its political trusteeship, but it belatedly embraced some of the prescriptions for building internal legitimacy by seeking to establish the foundation for a liberal democracy and perceiving the need for an exit strategy. The political trusteeship in Iraq has recognized the need to build political structures for managing internal conflict. It has sought to avoid democratic elections before the mediating institutions of a liberal democracy had sprouted. It has been deliberate in its effort to

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1. Henry H. Perritt, Jr., *Structures and Standards for Political Trusteeship*, 8 U.C.L.A. J. INT'L L. & FOREIGN AFF. 385 (2003) [hereinafter "Political Trusteeship"]; A "political trusteeship" is the exercise of sovereignty over a territory by international organizations or foreign powers for a limited time, for the benefit of the peoples of the territory, aimed at creating the capacity for self-government. It resembles the exercise of "mandatory" power under the League of Nations Mandate System and the exercise of "Trust" power under the United Nations Trusteeship System, but occurs outside those general treaty frameworks. It can be distinguished from more limited forms of international intervention such as peacekeeping. *Id.*

2. *Id.*

identify appropriate local and external elites. Despite these indicia of sophistication, the Bush Administration's Iraq policies have achieved modest results at best, and have been applied inconsistently. Often the implementation of the prescriptions was flawed and naïve, or driven by ideology or cronyism.

Abandoning a foolish early myth that the occupation army would be uniformly embraced, the Administration came to recognize, by late October of 2003, that intolerance for the occupying forces was high and building. Any sound exit strategy had to result in a turnover of governmental power before legitimacy of the trustee broke down completely. Working under this time pressure, the Administration formulated reasonably coherent concepts for evolving the initial Interim Authority into a more effective and more representative Iraqi interim government, while exploring a variety of ways in which to improve representation. At the same time, the Administration deferred popular elections until more progress was made on erecting mediating institutions.

The Bush Administration consciously was willing to pay the price of reduced international legitimacy in order to have greater control over a political trusteeship aimed at establishing internal legitimacy, building the institutions of a liberal democracy, and defining for itself an appropriate exit strategy.<sup>3</sup> Whether the results prove worth the price depends on how competently the U.S. exercises this control. So far, internal legitimacy is impaired by U.S. dominance of the political trusteeship. The institutions of liberal democracy are emerging slowly, if at all, amidst chaos and violence, and no coherent exit strategy, linked to concrete progress in building local capacity, is apparent.

The impact on American foreign policy depends in part on whether the Iraq intervention is successful. If it is, the United States will send a powerful signal that its new National Security Strategy is viable, at least in the short run, and the dynamics of international relations will reflect reactions to that doctrine.<sup>4</sup> An unsuccessful intervention, however, will undermine the credibility of the National Security Strategy and, with it, the credibility of American power. The lack of any post-war planning led to chaos, which undermined the international and internal legitimacy of the trustee. "Success" as originally defined by the Bush Administration is hard to imagine at this juncture—just after the handoff of sovereignty to an un-elected Interim Government.

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3. See *infra* Part II.C; see *infra* Part II.D; see *infra* Part II.E.

4. See *infra* Part III.B.

In either event, this article argues that the Iraq intervention has distracted attention from more important foreign policy objectives, including the urgent effort to understand the genesis of terrorism and to mobilize American resources to reduce the terrorist threat, while working through multilateral frameworks. Accomplishment of these is necessary for achieving important foreign policy goals.

## II. MEASURING THE IRAQ INTERVENTION AGAINST THE PRESCRIPTIONS FOR SUCCESSFUL POLITICAL TRUSTEESHIP

The experiences in Bosnia, Kosovo, East Timor, Afghanistan, and Iraq, combined with the history of earlier international interventions, teach that political trusteeships succeed when they are defined clearly to include the basic attributes of sovereignty: when they enjoy international legitimacy, when they attain an explicit goal to build liberal democracy, and when they are shaped by a coherent and realistic exit strategy to hand-off power to local institutions as their capacity increases.<sup>5</sup> The U.S.-led Iraq intervention is deficient in differing degrees on most of these measures. On the whole, the Administration did poorly in seeking and gaining international legitimacy for its political trusteeship in Iraq and stumbled badly in following the prescriptions for building internal legitimacy. While the U.S. civilian administration of Iraq apparently perceived the need for establishing the foundation for a liberal democracy, and perceiving the need for an exit strategy, the lack of serious planning and ignorance of Iraqi political dynamics made these goals more rhetorical than realistic. At best, the Bush Iraq policies may be faulted for achieving modest results and showing every sign of being stamped into a premature exit.

### A. *Failure to Define the Trusteeship Clearly.*

#### 1. *Clearly Define Where Sovereignty Resides*

*Political Trusteeship* argues that effective political trusteeship requires a clear legal framework investing temporary sovereignty in the trustee.<sup>6</sup> The legal framework for Iraq is ambiguous in important respects. The United States government has insisted on unilateral authority to make major decisions with respect to civil administration and the development of Iraqi institutions but has failed to explain how it exercises this authority through formal legal texts.<sup>7</sup> The United Nations

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5. See *Political Trusteeship*, *supra* note 1, at 472.

6. See *generally id.*

7. See *generally* notes 17–21 *infra* and accompanying text.

has declared that sovereignty reposes in indigenous organizations, while recognizing interim authority of the occupying powers under international law, providing no real detail as to how this joint exercise of sovereignty is supposed to work or to evolve.

On May 22, 2003, after U.S. and British forces militarily subdued resistance in Iraq, the U.N. Security Council adopted Resolution 1483 ("SCR 1483").<sup>8</sup> The Resolution recognized the role of the U.S. and Great Britain as occupying powers, while also embracing Iraq's self-determination.<sup>9</sup>

The Resolution left no doubt that the occupying authorities were to play the role of political trustees:

It "[c]alls upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future."<sup>10</sup>

The Resolution "[s]upports the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority."<sup>11</sup>

The Resolution also authorized the Secretary General to appoint a "Special Representative" to coordinate U.N. international-agency and Authority activities in Iraq, and to support development of local governmental institutions.<sup>12</sup>

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8. U.N. S.C. Res. 1483, U.N. SCOR, 58th Sess., 4176th mtg., U.N. Doc. S/RES/1483 (2003) [hereinafter Security Council Resolution 1483 or SCR 1483].

9. "Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the "Authority"). . ." *Id.* Pmb. "Stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources, welcoming the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and expressing resolve that the day when Iraqis govern themselves must come quickly. . ." *Id.*

10. *Id.* ¶ 4.

11. *Id.* ¶ 9.

12. "[W]orking intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative

In October of 2003, the Security Council adopted Resolution 1510, declaring that Iraqi sovereignty resides in Iraqi institutions, and urging the Coalition Provisional Authority (the civil administration established by the occupying powers) to devolve power to local institutions as soon as practicable.<sup>13</sup> The Resolution provided for a strengthened United Nations role in supporting local institutions, however, without, suggesting any U.N. power to make governmental decisions.<sup>14</sup> Under the Resolution, the local institutions are responsible for designing and implementing processes to write a constitution and hold national elections, with U.N. support.<sup>15</sup>

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governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq. . .” SCR 1483, *supra* note 8, ¶ 8(c). The U.N. Special Representative also is charged with: “promoting economic reconstruction and the conditions for sustainable development.” *Id.* ¶ 8(e). The Special Representative is also charged with “encouraging international efforts to contribute to basic civilian administration functions, promoting the protection of human rights, encouraging international efforts to rebuild the capacity of the Iraqi civilian police force, and encouraging international efforts to promote legal and judicial reform”. *Id.* ¶ 8(f)–(i).

13. U.N. S.C. Res. 1511, 58th Sess., 4844th mtg., U.N. Doc. S/RES/1511 (2003) [hereinafter Security Council Resolution 1511 or SCR 1511]. “[T]he sovereignty of Iraq resides in the State of Iraq, *reaffirming* the right of the Iraqi people freely to determine their own political future and control their own natural resources, *reiterating* its resolve that the day when Iraqis govern themselves must come quickly. . .” *Id.* Pmbl. The Resolution “*Determines* that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the Authority.” *Id.* ¶ 4. The resolution “*underscores*. . .the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483. . .which will cease when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority.” *Id.* ¶ 1. It “*calls upon* the Authority. . .to return governing responsibilities and authorities to the people of Iraq as soon as practicable and *requests* the Authority, in cooperation as appropriate with the Governing Council and the Secretary-General, to report to the Council on the progress being made.” *Id.* ¶ 6.

14. “[T]he United Nations, acting through the Secretary-General, his Special Representative, and the United Nations Assistance Mission in Iraq, should strengthen its vital role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government. . .” SCR 1511, *supra* note 13, ¶ 8.

15. The Resolution “[t]akes note of the intention of the Governing Council to hold a constitutional conference and, recognizing that the convening of the conference will be a milestone in the movement to the full exercise of sovereignty, calls for its preparation through national dialogue and consensus-building as soon as practicable and requests the Special Representative of the Secretary-General, at the time of the convening of the conference or, as circumstances permit, to lend the unique expertise of the United Nations to the Iraqi people in this process of political transition, including the establishment of

This framework left the political trustee's scope of decision-making responsibility unclear. The U.N. legal framework established a political trusteeship by declaring the duty to develop eventual self-governance and to govern for the benefit of the Iraqi people. The U.N. left the allocation of governing power between international and local institutions vague. It thus resembled Bosnia, except that in Bosnia the local institutions existed and had been recognized as sovereign before international intervention. It was far less focused than the resolutions defining the political trusteeships in Kosovo and East Timor, which left no question that the U.N. was to serve as political trustee.<sup>16</sup>

The legal framework for the United States' role through its Coalition Provisional Authority ("CPA") also was ambiguous under U.S. law. The Administrator of the CPA, in his Regulation No. 1, determined, "the CPA shall exercise the powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration . . ."<sup>17</sup> It declared, "[t]he CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions . . . and the laws and usages of war."<sup>18</sup> The CPA thus asserted sovereign powers, yet the source of these powers is unclear.

Congressional oversight of the CPA implied that some attributes of sovereignty remained with the United States, but the President issued no executive order establishing the CPA, and no statute defined it or even explicitly referred to it, except for the Iraq Emergency Supplemental Appropriation Act.<sup>19</sup> It is unclear whether the Administrator of the CPA reported directly to the President or to the Secretary of Defense.<sup>20</sup> The

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electoral processes. . ." SCR 1511, *supra* note 13, ¶ 10.

16. See Political Trusteeship, *supra* note 1, at 401—404.

17. Coalitional Provisional Authority [hereinafter CPA], § 1, ¶ 1 (2003), *available at* [http://www.iraqcoalition.org/regulations/20030516\\_CPAREG\\_1\\_The\\_Coalition\\_Provisional\\_Authority\\_.pdf](http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf) (last visited June 25, 2004).

18. *Id.* ¶ 2.

19. Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, H.R. 3289, 108<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2003) [hereinafter Iraq Emergency Supplemental Appropriation]. An appropriations rider requires the Director of OMB, in consultation with the Administrator of the CPA to report to the Congress on the uses of appropriated funds on a project-by-project basis. *Id.* § 2207(a). The Act appropriates funds to the President for the "Coalition Provisional Authority in Iraq (in its capacity as an entity of the United States Government). . ." *Id.* The Act extends certain of its requirements to "any successor United States Government entity with the same or substantially the same authorities and responsibilities as the Coalition Provisional Authority in Iraq." *Id.* § 2208.

20. "The president made a decision to start it out with Jerry Bremer reporting to me.

duties of the CPA were similarly vague, except for a few appropriation-act requirements which are bizarre in their particularity, singling out opportunities for the disabled and women, and ending religious discrimination as mandates for the CPA, but not otherwise addressing political trustee obligations.<sup>21</sup> The CPA established the Interim Iraqi Governing Council, which was meant to exercise indigenous authority. But its power was contingent on CPA approval, and it owed its existence entirely to the decrees of the CPA.

While the United States apparently sought to reduce ambiguity in defining the political trusteeship in Iraq by insisting on unilateral authority, the result was a muddle, in terms of who was responsible for what, and in terms of how the trusteeship was to evolve. Within this vague legal framework, de-facto exercise of political power by three independent authorities—the U.N., the U.S.-created CPA, and the CPA-created IGA—inevitably led to confusion and conflict.

When sovereignty was formally transferred to the Interim Government on June 28, 2004, the formal legal documents were less ambiguous than those that had preceded them. A “Law of

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The implication in the press was that he was going to report to the White House or Condi Rice. As Condi has indicated, that was not the import of the memo, that’s not what the memo said, that’s not what was intended. We know that that activity, as it matures, will migrate over at the Department of State. I mean, that’s how—where ambassadors report. And eventually, it will arrive there at some point. And that would be a decision would make at some point as these—as the task kind of moves less security towards more political and economic, one would think.” Press Conference, Secretary of Defense Donald H. Rumsfeld with NATO Secretary General Lord Robertson (Oct. 8, 2003), *available at* <http://www.defenselink.mil/transcripts/2003/tr20031008-secdef0746.html> (last visited June 24, 2004). “Nothing changes in terms of the Coalition Provisional Authority and the Department of Defense. This is still being led by the Pentagon. . .” Press Briefing, White House Press Secretary Scott McClellan (Oct. 6, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/10/20031006-5.html#10> (last visited June 24, 2004).

21. Iraq Emergency Supplemental Appropriation, *supra* note 19. The Act requires procurement to occur under federal procurement law. Iraq Emergency Supplemental Appropriation. *Id.* The Act requires reports by the Secretary of state on efforts to encourage contributions by other countries, to encourage addressing the needs of people with disabilities, and to ensure that a new Iraqi constitution preserves religious freedom and tolerance of all religious faiths. *Id.* § 2215(b). The act requires that post-conflict stability activities “to the maximum extent practicable. . .increase the access of women to, or ownership by women of, productive assets such as land, water, agricultural inputs, credit, and property in Afghanistan and Iraq, respectively; provide long-term financial assistance for education for girls and women in Afghanistan and Iraq, respectively; and integrate education and training programs for former combatants in Afghanistan and Iraq, respectively, with economic development programs to encourage the reintegration of such former combatants into society; and promote post-conflict stability in Afghanistan and Iraq, respectively.” *Id.* § 2217.



Administration for the State of Iraq for the Transitional Period,” negotiated between the CPA and Iraqi leaders and signed March 8, 2004, provides for the transfer of power from the CPA to a “fully sovereign Iraqi Interim Government” that was to take power on June 30, 2004.<sup>22</sup> The U.N. Security Council approved the new arrangement in Security Council Resolution 1546, and the CPA disbanded itself in its Regulation 9.<sup>23</sup> Certain legal questions remained unclear. What was the source of authority that the CPA passed to the Interim Government? Presumably sovereignty gained as a result of military conquest. What force do the CPA regulations have under the new regime? CPA order 100 provides that CPA regulations remain in force until they are changed by the new Interim Government. Presumably the source of power to make those regulations was the law of belligerent occupation, given the reference by both the U.N. Security Council and the CPA to the “laws and usages of war.”

## 2. *Avoid Archaic Limitations on the Exercise of This Sovereignty*

*Political Trusteeship* argues that successful political trusteeship requires that the trustee be free of archaic limitations on the exercise of governmental powers, particularly those derived from the doctrine of belligerent occupation.<sup>24</sup> Under this doctrine, a belligerent occupant may not make changes in law or institutional arrangements beyond those absolutely necessary to protect the security and viability of the occupation. If the changes would be difficult to undo if the previous sovereign returns, the law of belligerent occupancy prohibits them.<sup>25</sup> On the other hand, if a change in the status quo is necessary to protect the immediate interests of the population of the occupied territory it is permissible, even though the returning sovereign-ante may have difficulty undoing it.<sup>26</sup>

Declarations in the Security Council resolutions for Iraq state, “sovereignty of Iraq resides in the State of Iraq,” combined with express limitations on CPA authority to that permitted “under applicable international law and to that to “be exercised . . . under the laws and usages of war,” permit the inference that the doctrine of belligerent

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22. See Law of the Administrations for the State of Iraq for the Transitional Period, available at <http://www.cpa-iraq.org/government/TAL.html>. (last visited August 26, 2004).

23. See generally Governing Council Dissolution, available at [http://www.iraqcoalition.org/regulations/20040609\\_CPAREG\\_9\\_Governing\\_Council\\_s\\_Dissolution.pdf](http://www.iraqcoalition.org/regulations/20040609_CPAREG_9_Governing_Council_s_Dissolution.pdf). (last visited July 8, 2004).

24. See *Political Trusteeship*, *supra* note 1, at 421—423.

25. *Id.* at 412—414.

26. *Id.*

occupation limits trustee authority.<sup>27</sup> The rationale for the limitations on change imposed on belligerent occupants is that the “State of Iraq” continued to exist notwithstanding the U.S.-led invasion.<sup>28</sup> The possibility that the limitations of the doctrine of belligerent occupancy are acknowledged by the Security Council’s reference to “occupying powers” and “relevant” and “applicable” international law, and by the CPA’s reference to “laws and usages of war” is problematic. Respecting these limitations will make fundamental economic, legal, and political reform impossible. Ignoring these limitations will undercut legitimacy.

### 3. *Tie Civil Administration to Military Security Forces*

*Political Trusteeship* argues that successful political trusteeship requires close coordination between political trustees and military as well as security forces operating in the trust territory.<sup>29</sup> Such coordination is necessary so that a security environment exists within which the exercise of civilian authority is a reality; and decisions by the political trustee can be enforced.<sup>30</sup> While the military occupation of Iraq might seem to meet this requirement due to the seamless integration of the CPA and the occupying military forces, closer examination of the legal structure for the civil administration reveals serious ambiguities about who is in charge and how civilian/military coordination is supposed to occur.

The Administrator of the CPA determined, “the Commander of U.S. Central Command shall directly support the CPA by deterring hostilities; maintaining Iraq’s territorial integrity and security; searching

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27. Security Council Resolution 1511, *supra* note 13, pmb.; CPA Regulation No. 1 § 1, ¶ 2; see also Pieter H.F. Bekker, *ASIL Insights: The Legal Status of Foreign Economic Interests in Occupied Iraq* (July 2003), at <http://www.asil.org/insights/insigh14.htm> (last visited June 24, 2004) (arguing that Articles 43 and 46 of Hague Regulations, absent any provision in Security Council resolutions voiding contracts or authorizing interference with property, require occupying authority to respect pre-invasion contract rights).

28. The legal requirement that the occupant minimize changes to fundamental laws and institutions derives from the legal principle that the ousted power retains sovereignty, “albeit in a state of abeyance,” over the held territory. The duty to protect the status quo arises from international laws recognition of “that kind or precariousness which results from the fact that a war is still going on. No matter how unlikely a reversal of fortunes may be in fact, a territorial change obtained by a belligerent during and in the course of a war is not treated as final state succession, but as ‘belligerent occupation.’” *Political Trusteeship*, *supra* note 1, citing and quoting Ernst H. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, 5 ¶ 11 (Carnegie Endowment for Int’l Peace, Div. of Int’l Law, Monograph No. 6) (1942).

29. *Political Trusteeship*, *supra* note 1, at 423—424.

30. *Id.*

for, securing and destroying weapons of mass destruction; and assisting in carrying out Coalition policy generally.”<sup>31</sup> The shortcoming of this order is that it is unclear whether the Administrator of CPA reports to the Commander of U.S. Central Command, in which case he lacks the authority to give orders to the Commander, or whether the Commander reports to him, as the quoted language implies. In the absence of a formal delegation of authority from the Secretary of Defense or the President to the Administrator of the CPA, the Administrator is not in the chain of command of the Commander and thus lacks authority over him.<sup>32</sup> Turnover of sovereignty to interim Iraqi authorities exacerbates the confusion because now, theoretically, U.S. forces are subject to direction by a foreign government.

### *B. Failure to Achieve International Legitimacy*

*Political Trusteeship* argues that successful political trusteeship requires international legitimacy, which, in turn, depends on harnessing international law, reducing threats to international peace and security, holding democratic elections, enforcing human rights, demonstrating governmental effectiveness, providing charismatic leadership, and bringing an end to national-stage conflicts.<sup>33</sup> On the eve of the U.S.-led attack, President Bush identified threats to international peace and security as the principal justification for starting the war to force Saddam Hussein from power.<sup>34</sup> In particular, he argued that Saddam Hussein’s possession of weapons of mass destruction and the imminent

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31. CPA Regulation No. 1 § 1, ¶ 3.

32. “The commanding officer of the facility is not legally bound to follow the orders of anyone outside his operational chain of command, no matter what that person’s rank.” Lt. Commander Thomas C. Wingfield, *The Chemical Weapons Convention and the Military Commander: Protecting Very Large Secrets in a Transparent Era*, 162 MIL. L. REV. 180, 217 (1999). “Unless otherwise directed by the President, the chain of command to a unified or specified combatant command runs from the President to the Secretary of Defense; and from the Secretary of Defense to the commander of the combatant command.” See 10 U.S.C. § 162(b). See generally Jennifer M. Rockoff, Case Note, *Prosecutor v. Zejnil Delalic (the Celebici Case)*, 166 MIL. L. REV. 172 (2000) (discussing prosecutor’s obligation to demonstrate that person giving orders was in chain of command, in war crimes prosecution). The controversy over prisoner abuse and torture by the U.S. armed services in Iraq revealed uncertainty even on the part of the Secretary of Defense as to the chain of command.

33. Political Trusteeship, *supra* note 1, at 426–428.

34. “[T]he Iraqi regime continues to conceal some of the most lethal weapons ever devised. It has used weapons of mass destruction. It has a history of reckless aggression and a deep hatred for America and our friends. And it has aided terrorists, including al-Qaida. Using chemical, biological, or one day, nuclear weapons, obtained with the help of Iraq, terrorists could kill thousands, or more.” President George W. Bush, Televised Address (Mar. 17, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030317-10.html> (last visited June 26, 2004) [hereinafter “Bush Speech”].

likelihood of his using them justified immediate use of military force without waiting for further U.N. inspections or for explicit authority for military force from the U.N. Security Council.<sup>35</sup> He asserted that the war was legal under the privilege of self-defense and under earlier Security Council resolutions.<sup>36</sup> Immediate intervention was also justified as necessary to prevent further human rights abuses by the Iraqi regime and to install democracy in Iraq.<sup>37</sup> The United States largely failed to convince the international community that any of these justifications was valid.<sup>38</sup> Formal Bush Administration justifications touched the bases of international legitimacy, but its political rhetoric emphasizing unilateralism, the divergence between its perceptions and the perceptions of most of the rest of the world of Iraq's threat to international peace and security, and the subsequent lack of concrete evidence to back Bush Administration claims, made its references to the hallmarks of international legitimacy appear disingenuous or incompetent.<sup>39</sup>

### 1. *Harness International Law*

In seeking international support for its intervention in Iraq, the Bush Administration underestimated the power of international law as a source of international legitimacy. In the Administration's attempt to justify invading Iraq, international legal arguments were muted and some of the rhetoric suggested that international law was irrelevant.<sup>40</sup>

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35. Bush Speech, *supra* note 34.

36. "We are acting to protect our homeland." *Id.* "Under U.N. Resolutions 678 and 687, both still in effect, we are authorized to use force in ridding Iraq of weapons of mass destruction." *Id.*

37. *Id.*

38. See Steven R. Weisman, *Threats and Responses: Foreign Policy; A Long Winding Road to a Diplomatic Dead End*, N.Y. TIMES, Mar. 17, 2003, at A1.

39. International legitimacy for the invasion is surely even lower now than at the time of the invasion because of revelations by former National Security Council staff and the Senate Intelligence Committee that there was no credible evidence of links to al Qaeda or of weapons of mass destruction. See RICHARD A. CLARK, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* 30—32 (2004). It is clear to most observers that the Bush Administration's decision to start a war in Iraq was motivated by ideology and opportunism and not by facts.

40. Compare Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L LAW 607, 608, 610 (2003) (United States all but discarded "fig leaf" of legal justification for attacking Iraq, reflecting broader attack on international law) and Lori Fisler Damrosch and Berard H. Oxman, *Editors' Introduction: Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 553, 553 (2003) (noting absence of explicit legal opinion from U. S. government) with William H. Taft, IV and Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003) (stating that U.S. invasion of Iraq "was and is lawful").

Achieving international legitimacy for political trusteeship depends in substantial measure on persuasive arguments that the intervention into the affairs of another country satisfies international law. The decades-old debate over the relevance of international law to a successful foreign policy and its impact on state behavior continues.<sup>41</sup> Nevertheless, appeals to international law influence public opinion in democracies, and, in turn shape the foreign policies of democratic governments.<sup>42</sup> The norms of international law also shape the attitudes of non-state actors such as the growing universe of Non-Governmental Organizations ("NGOs"), which exercise increasing influence in international forums and with domestic publics.

International law's power as a source of international legitimacy is strengthened by the evolution of the international relations system. The international legal and political system no longer can be represented accurately by a model of impermeable states interacting only with each other.<sup>43</sup> Many private institutions enjoy power in international politics and law that rivals that exerted by traditional states.<sup>44</sup> "It is through the

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41. See GEORGE F. KENNAN, *AT A CENTURY'S ENDING* 272 (1996) (denying existence of "clear and generally accepted international code of behavior; only interests determine state behavior").

42. See Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239, 323 (2003); see Mortimer "Tim" Sellers, Book Review, *International Law in Antiquity*, by David J. Bederman, 15 EMORY INT'L L. REV. 521, 525 (2002) ("Then, as now, unfavorable public opinion would punish most violations of international law."). Compare JAMES C. HSIUNG, *ANARCHY AND ORDER: THE INTERPLAY OF POLITICS AND LAW IN INTERNATIONAL RELATIONS* 5-26 (1997) (criticizing neorealist position and arguing that international law is an "integral part of international politics") with JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001) (presenting theory of "offensive realism," which denies that anything other than power relationships and the desire for hegemony drives international relations).

43. See Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 11 (2002) (characterizing states as "disaggregating," and citing critics of billiard-ball theory of international relations); Peter G. Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 COLUM. J. TRANSNAT'L L. 33, 79 (2002) (concluding that billiard-ball view of international relations does not comport with realities of human rights movement); Jose E. Alvarez, *Comment on Anne Marie Slaughter, A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 250 (2000) (applauding "insight that states are not opaque billiard balls but collections of actors with concrete interests"); Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 10 (1999) (noting traditional positivist/realist view of international relations "'billiard ball' states that interact only with one another").

44. See Jessica T. Mathews, *Power Shift*, 76 FOREIGN AFF. 50, 59 (1997) (creating new constituencies for compliance with international law by NGOs). Francois Rigaux's "Transnational Civil Society," involves three types of actors: the state acting through its domestic law, the community of states in the international order, and individuals acting through private initiatives including NGOs. INTERNATIONAL LAW: ACHIEVEMENTS AND

non governmental organizations and, more and more often, through the mass media that world public opinion makes its voice heard on the major problems requiring action at the international level.”<sup>45</sup> NGOs and other private actors deal with each other and exert pressure through national interest groups, thereby shaping the policies of states.<sup>46</sup>

New communication technologies, including the Internet, empower national interest groups, strengthening the interpenetration process.<sup>47</sup> The same technologies, as they blur the lines between domestic interest groups and international NGOs, also strengthen the power of individuals and small-group interests—weak in domestic politics—to be expressed and given fulfillment through international NGOs.<sup>48</sup> No longer is the choice of intervention solely the province of political elites and professionals in diplomacy; now, due to information technology and the growing influence of NGOs and other international interest groups, it is a mass political question. Democratization strengthens the effect of international law because international law, as rhetoric, influences masses more than it influences leadership cadres, who are more likely to set policy based on interests in the realist tradition.

The Bush Administration conspicuously failed to mobilize international law as a source of international legitimacy, in significant

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PROSPECTS 12 (Mohammed Bedjaoui ed., 1991).

45. INTERNATIONAL LAW, *supra* note 44; *see generally* Martin Wolf, *Uncivil Society*, FINANCIAL TIMES, Sept. 1, 1999, at 12 (lamenting role of NGOs in blocking negotiation of multilateral agreement on investment; “only elected governments can be properly responsible for the making of law, domestically and internationally. . . . to grant any private interests a direct voice in negotiations over how coercion is to be applied is fundamentally subversive of constitutional democracy”). “If NGOs were indeed representative of the wishes and desires of the electorate those who embrace their ideas would be in power. Self evidently, they are not.” *Id.*

46. Professor Koh’s “transnationalist” school of international relations theory emphasizes the role of private actors in international law. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183—85 (1996).

47. *See* Henry H. Perritt, Jr., *The Internet is Changing the Public International Legal System*, 88 KY. L. REV. 885 (2000).

48. In his illuminating synthesis of competing and overlapping strands of international law, Harold Koh explores the process of “norm internalization.” *Cf.* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2645 (1997); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998) (offering examples of internalization of international law: 12-mile territorial limit from UNCLOS III, landmines treaty, European Human Rights Convention, torture convention). The process can be viewed at three overlapping and potentially reinforcing levels: the level of the international system itself; the level of individuals and groups who make up the state; and the processes and institutions of domestic politics. He explains that transnational actors such as public officials, “norm entrepreneurs,” and NGOs mobilize domestic elites and popular constituencies and set in motion a domestic political process that internationalizes a norm of international law. *See id.* at 2649—50.

part because of its embrace of neorealist theories of international relations that demean the effect of international law.<sup>49</sup> It failed to convince the international community that its invasion was justified by the privilege of self-defense, and it gained only marginally greater acceptance of the proposition that the invasion was legal because it was authorized by earlier Security Council resolutions on Iraq.<sup>50</sup>

*(a) Understand that International Law Operates Within an Evolving Set of Norms*

International law is not fixed; it evolves through a combination of state practice and *opinio juris*. Several commentators and the National Security Strategy document issued by the Bush Administration, argue that the U.S.-led invasion of Iraq was an appropriate and necessary way to modify the privilege of self-defense recognized in customary international law and incorporated into Article 51 of the U.N. Charter. The modification brings the privilege in line, they argue, with the realities of a world in which little warning of terrorist attacks or attacks with weapons of mass destruction can be expected.<sup>51</sup>

International law evolves in response to changes in state practice, but the U.S. invasion of Iraq represented a revolution—or perhaps a renunciation—with respect to international law.<sup>52</sup> Unlike Israel's

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49. Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1521 (2003) ("Iraq invasion was illegal under international law"); Miriam Shapiro, *Iraq: the Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599, 603 (2003) (arguing that the U.S. could not justify invasion of Iraq as self-defense because no evidence of imminent threat); Richard A. Falk, *What Future for the UN Charter System of War Prevention*, 97 AM. J. INT'L L. 590, 598 (2003) (showing that facts did not support the case for preemption because there was neither imminence nor necessity); Richard A. Falk, *What Future for the UN Charter System of War Prevention*, 97 AM. J. INT'L L. 590, 592 (2003) (characterizing worldwide reaction to Bush Administration plans and justification for invading Iraq as "highly critical").

50. Taft, *supra* note 40 (arguing that U.S. invasion of Iraq was legal because it responded to a material breach of Iraq's obligations under earlier U.N. Security Council resolutions, and that this justification was accepted in Security Council Resolution 1441).

51. See generally, The National Security Strategy of the United States of America, available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited June 24, 2004) [hereinafter NSS document]; Taft, *supra* note 40, at 563 (recognizing preemptive use of forceful law "need to adapt the concept of imminence to the capabilities and objectives of today's adversaries"); *id.* at 563 (recognizing preemptive use of force lawful where it represents episode in ongoing broader conflict and consistent with Security Council resolutions).

52. Jane E. Stromseth, *Law and Force after Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 635 (2003) (noting that U.S. failed to pursue effectively opportunity to use unilateral action to force evolution in international law because it articulated preemption doctrine with uncertain and broad parameters instead of a more focused position); Shapiro, *supra* note 47, at 604—05 (2003) (noting possibility that international law of self-defense needs to adapt, but U.S. could have promoted adaptation more effectively by more limited

preemptive attacks against Egypt and Syria in 1967, Iraq did not have a massed army, ready to attack the United States.<sup>53</sup> Moreover, the avowed purpose of the U.S. invasion of Iraq was to displace a sitting government; Israel pursued only a counter-force strategy, and left the governments of Syria and Egypt intact. There was no imminent threat from Iraq, and the U.S. strategy was not proportional to the threat that existed.<sup>54</sup>

The Iraq invasion differed significantly from preceding instances of international intervention. Unlike Desert Storm, the goal in Iraq in 2003 was regime change. Unlike Desert Storm, there was no advance U.N. Security Council resolution and there was no broad coalition. In Iraq in 2003, a political trusteeship resulted without U.N. approval. The sitting government continued after Desert Storm, albeit subject to significant U.N.-approved economic and security sanctions. Unlike the international intervention in Bosnia, U.S. intervention in Iraq displaced a sovereign government, establishing a foreign political trustee with full executive, legislative, and judicial powers. Unlike Kosovo, Iraq was not supported by a real coalition of major states.<sup>55</sup> The post-war civil administration was unilateral, not multilateral.<sup>56</sup> The political trusteeship was an aspect of military occupation; not the responsibility of a separate civil administration.<sup>57</sup>

While plausible arguments exist that international law needs to evolve in the wake of the September 11, 2001 attacks against the United States, the Iraq invasion was not incremental, which would have enhanced claims of a deliberate effort by the U.S. to nudge international norms in the right direction. Rather, it was radical, and thus, more easily viewed as a renunciation of those norms altogether.

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action and rhetoric).

53. See Shapiro, *supra* note 47, at 601 (describing Israel's justifications for 1967 attack on Egyptian forces, and 1981 attack on Iraq nuclear facility).

54. See Falk, *supra* note 47, at 592 (noting lack of evidence of need for Iraq invasion to prevent use of weapons of mass destruction).

55. See generally Stromseth, *supra* note 50, at 633—34 (rejecting resolution by U.N. Security Council to condemn Kosovo intervention created opportunity to adapt international law).

56. The head of the CPA was appointed by the Secretary of Defense and/or the President of the United States, and asserted in his first official issuance sole executive legislative and judicial authority. See CPA, *supra* note 17.

57. See generally Falk, *supra* note 47, at 591 (noting efforts by Independent International Commission on Kosovo to reconcile Kosovo intervention with obligations under U.N. Charter).



(b) *Reconcile Principles of Sovereignty and Self-Determination*

The U.S.-led intervention in Iraq failed to draw legitimacy from international law's respect for sovereignty or from its respect for self-determination. After the end of World War I, the international community struggled to integrate the conflicting norms of respect for sovereignty and self-determination into the international legal system. Intervention in support of either norm enjoyed a measure of legitimacy in the international community.

The conflicts in Bosnia, Kosovo, and East Timor were the products of struggles for self-determination by a minority population against assertions of sovereignty by an overarching state.<sup>58</sup> International intervention in those cases could be justified by the need for intervention to protect the privilege of self-determination and the need to protect human rights of populations seeking self-determination, even though intervention undermined claims of sovereignty.<sup>59</sup> The 1991 military action in Kuwait and Iraq could be justified as necessary to protect Kuwait's sovereignty.

The U.S.-led invasion of Iraq in 2003 flouted both sovereignty and self-determination. Iraq's sovereignty was intact under Saddam Hussein and he presented no imminent threat to the sovereignty of any other state. The Bush administration expressed the goal of self-determination for the peoples of Iraq, but was vague as to which peoples needed international intervention to realize their aspirations of separate or different government. Moreover, the facts did not support intervention based on the principle of self-determination. Unlike Bosnia, where the seceding state had declared independence after a referendum; unlike East Timor, where the people of a specific territory petitioned the international community for separation after a referendum; and unlike Kosovo, where a separate and parallel government existed, backed up by a growing guerrilla insurgency; the desire for political change in Iraq arose in the minds of the leadership of a foreign state rather than from the objective behavior of peoples in Iraq.<sup>60</sup>

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58. See Political Trusteeship, *supra* note 1 at 398 n. 53 (Bosnia), 401 n. 69 (Kosovo), 403 n. 75 (East Timor).

59. Moreover, in all three cases, the state asserting sovereignty ultimately consented to the intervention.

60. See generally Falk, *supra* note 47, at 591 (identifying possibilities that Iraq invasion could be justified as necessary to end crimes against humanity and to prepare Iraqi people for political democracy and economic success).

(c) *Seek Consent or U.N. Approval*

Generally, popular opinion accepts the premise that political trusteeship or military action leading up to political trusteeship is not permissible under international law unless the United Nations Security Council approves the international intervention in advance. This premise enjoys uncertain support in both state practice and in scholarship of international law. Nevertheless, approval by the U.N. Security Council, either before or after the fact, is broadly perceived as a powerful source of legality and international legitimacy:

“[T]he preemptive use of force by the United States against Iraq or any other sovereign nation pursuant to an appropriate authorization by the Security Council would seem to be consonant with international law. Less clear is whether international law currently allows the preemptive use of force by a nation or group of nations without Security Council authorization.”<sup>61</sup>

Of the major post-Cold War political trusteeships, only East Timor and Bosnia enjoyed unequivocal approval in advance.<sup>62</sup> In Kosovo, advance approval for the NATO bombing campaign was not sought, but advance approval by the U.N. preceded the entry of NATO troops and the establishment of the U.N.-run political trusteeship.<sup>63</sup> In Afghanistan, the U.N. Security Council resolution did not clearly approve the use of force. In Iraq, advance approval was altogether lacking.

Under Article 51, advance approval of military force by the Security Council is unnecessary when application of force is justified as “self-defense.”<sup>64</sup> Most experts question whether the U.S.-led invasion of Iraq complied with the privilege of self-defense under international law.<sup>65</sup> Subsequent U.N. Security Council resolutions recognize the fact of U.S. trusteeship, but are ambiguous about its legal scope, emphasizing the need to return responsibility to Iraqi institutions, which, they say, have never relinquished sovereignty.<sup>66</sup>

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61. David M. Ackerman, *International Law and the Preemptive Use of Force Against Iraq*, CRS Report to Congress (Mar. 17, 2003) (Order Code RS21314), at [http://www.usembassy.at/en/download/pdf/iraq\\_intlaw.pdf](http://www.usembassy.at/en/download/pdf/iraq_intlaw.pdf) (last visited June 24, 2004).

62. See Political Trusteeship, *supra* note 1, at 398—99, 403.

63. Klinton V. Alexander, *NATO's Intervention in Yugoslavia: The Legal Case for Violating Yugoslavia's Sovereignty in the Absence of Security Council Approval*, 22 *HOUS. J. INT'L L.* 403, 430 (2000).

64. U.N. CHARTER, art. 51.

65. See Frederic L. Kirgis, *ASIL Insights: Pre-emptive Action to Forestall Terrorism* (June 2002), available at <http://www.asil.org/insights/insigh88.htm> (last visited June 24, 2004) (summarizing arguments for and against legality).

66. See Bekker, *supra* note 27.

Post-invasion U.S. policy did not seek clear U.N. Security Council approval until the June, 2004 handover. National Security Advisor Rice said, at the beginning of the U.S.-led invasion of Iraq, that the United States envisioned only a limited role for the U.N. in the political trusteeship for Iraq.<sup>67</sup> In November of 2003, Germany, Britain, and France called for an international conference on Iraq, similar to the conference held for Afghanistan in 2001.<sup>68</sup> Such a conference presumably could have worked out a mandate to be adopted by the Security Council, as similar conferences did in Bosnia, Kosovo, and Afghanistan.<sup>69</sup> The United States asked the Security Council to wait for a letter from the Iraq Governing Council, expected to contain "instructions" regarding U.N. involvement in the ongoing political trusteeship in Iraq.<sup>70</sup>

The Bush Administration has paid the price of reduced international legitimacy by sidelining the U.N. in order to have the benefits of better control over a political trusteeship aimed at establishing internal legitimacy, building the institutions of a liberal democracy, and defining for itself an appropriate exit strategy.<sup>71</sup> Whether the results prove worth the price depends on much greater success than is apparent so far in increasing internal legitimacy for the political trusteeship, building the institutions of liberal democracy, and in linking an exit strategy to concrete progress in building local capacity.

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67. "The coalition is committed to working in partnership with international institutions, including, of course, the United Nations. But I would just caution that Iraq is not East Timor, or Kosovo, or Afghanistan. Iraq is unique."

"When I said that this isn't East Timor, that was a new state. When I said, not Afghanistan; that was a failed state. When I said, not Kosovo; it's not a state at all. Clearly, that's not Iraq. And Iraq is a country with a pretty sophisticated bureaucracy, for instance. I think we will look to see what technocratic talent there is among civil servants that can help in the rebuilding of Iraq." National Security Advisor Dr. Condoleezza Rice, Press Briefing (Apr. 4, 2003), available at <http://usinfo.state.gov/topical/pol/terror/texts/03040412.htm> (last visited June 24, 2004).

68. Kirk Semple, *Germany, France and Russia ask U.N. to Call International Meeting on Iraq's Future*, N.Y. TIMES, Nov. 22, 2003, at A7.

69. The Dayton Accords were negotiated outside U.N. auspices, and subsequently adopted by the Security Council. See Political Trusteeships, *supra* note 1. Negotiations outside the U.N. by the "Contact Group" produced the framework for political trusteeship subsequently adopted in Security Council Resolution 1244. See *id.* The Berlin Agreement was negotiated outside the U.N. and subsequently incorporated by reference in Security Council resolutions. See *id.*

70. *Id.*

71. See *infra* Part II.C.; see *infra* Part II.D.; see *infra* Part II.E.

## 2. *Reduce Threats to International Peace and Security*

Even if the U.S.-led invasion of Iraq and its subsequent political trusteeship violated international law in a formal sense, these actions might nevertheless have enjoyed a sense of international legitimacy if the United States had proven correct in its assertion that its unilateral use of military force was necessary to protect the peace and security of other states. As the U.S.-led attack against Iraq began, President Bush claimed that the war and the elimination of Saddam Hussein from power would enhance international peace and security.<sup>72</sup> The absence of evidence of ties between the Iraqi regime of Saddam Hussein and al Qaeda or other international terrorist organizations and the absence of weapons of mass destruction have negated this possibility.

The U.S.-led invasion of Iraq may actually have increased threats to international peace and security. In the words of a United States Institute of Peace review author:

“[S]o far as the battle against al Qaeda is concerned, the invasion of Iraq was a non sequitur. No convincing evidence of a substantive link between the Baghdad regime and Osama bin Laden’s organization has ever been presented, and, in fact, the intelligence record of the last decade suggests that while contacts may have occurred and terrorist operatives may have crossed through Iraq, no collaborative efforts of note have occurred between the arch-secularist Baath regime and the radical fundamentalists of al Qaeda.

“For the war on terrorism in the broadest sense, the invasion of Iraq brought two important advantages: A state sponsor of terrorism, albeit a rather inactive one, has been removed, and the demonstration of military might in toppling Saddam Hussein’s regime has given the United States more leverage against the outstanding state sponsors of terrorism—Iran and Syria. . . . But as a threat to U.S. interests, the state sponsors are of relatively minor consequence compared to the non-state actors such as al Qaeda—which may in fact benefit from the American occupation of Iraq. . . . How does al Qaeda benefit? The greatest windfall for bin Laden’s forces comes in the realm of propaganda, not a small issue for a movement that views establishing itself as the undisputed champion of Islam as a primary goal. By occupying Iraq, the United States has given al Qaeda a major

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72. President Bush stated, “In a free Iraq, there will be no more wars of aggression against neighbors. . . .” The White House, *Global Message* (Apr. 5, 2003), available at <http://www.whitehouse.gov/news/releases/2003/04/20030405-1.html> (last visited June 24, 2004). See also Press Briefing, *supra* note 67 (“Our goals are clear: We will help Iraqis build an Iraq that is whole, free and at peace with itself and with its neighbors; an Iraq that is disarmed of all WMD; that no longer supports or harbors terror . . .”).

opportunity to drive home its argument that the "leader of world infidelity" seeks to destroy Islam and subjugate its believers. This has been at the very core of al Qaeda's message throughout its existence, and the group is now using the example of Iraq to reap gains in the areas of recruitment and fundraising.

"Independent polling by groups such as the Pew Foundation and others has established that conditions are ripe for this message since there has been a massive turn in public opinion against America in the last two years. The data suggest that the long slow erosion of positive feelings about the United States has given way to a landslide during the period of the war on terror, and especially during the run-up to the invasion of Iraq. A long-term U.S. presence in Iraq, a central country within the historic realm of Islam and a longtime seat of the caliphate, will make it difficult to reverse these impressions. Positive perceptions about the reconstruction of Iraq may help, but they will have to be strong ones, widely affirmed by Iraqis themselves, to reverse this trend.

"There are also further threats, such as proliferation of weapons and other dangerous materials. In the worst-case scenario, weapons of mass destruction material may have been privatized by regime adherents who know their future in an American-guided Iraq is unpromising. Additionally, weapons such as shoulder-fired anti-aircraft missiles, of which Iraq had many, may have fallen into terrorist hands—a possibility that has been voiced by senior U.S. military officials."<sup>73</sup>

The Peace Institute report makes it clear that U.S. intervention in Iraq does not enjoy international legitimacy based on its mitigation of threats to international peace and security.

### 3. *Hold Democratic Elections*

In Iraq, the United States has failed thus far to employ democratic elections to build international legitimacy for its political trusteeship.<sup>74</sup> Democratic elections serve two purposes in legitimating political trusteeships. First, they serve to express the self-determination aspirations of a people opposing exercise of sovereignty by a state of which they are a part or a regime to which they are subject. Second,

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73. United States Institute of Peace, *Global Terrorism after the Iraq War* (Oct. 2003), available at <http://www.usip.org/pubs/specialreports/sr111.html> (last visited June 24, 2004).

74. As Part II.B § 3, explains, premature democratic elections may undercut the success of a political trusteeship in establishing a liberal democracy. U.S. reluctance to accept early democratic elections in Iraq may be prudent, but the point made by the text is that failure to hold elections undercuts international legitimacy in the short run. Political Trusteeship, *supra* note 1, at 437—38, 449—451.

democratic elections validate local governmental institutions that the trustee is preparing for eventual self-government.<sup>75</sup>

As self-determination is a potent legal basis for intruding on sovereignty, elections linked to the power of self-determination are a powerful source of international legitimacy for international intervention.<sup>76</sup> Elections in Bosnia in 1991, in Kosovo in 1991, and in East Timor in 1982 served this function.<sup>77</sup> With democracy as an increasingly embraced goal of the international legal system, post-intervention elections support claims that the political trusteeship is necessary in part to help local populations achieve the benefits of democracy.<sup>78</sup> Elections, under the supervision of a political trustee in Bosnia in 1996, in Kosovo in 2000, and in East Timor in 2001, served this function. President Bush embraced the spread of democracy as a goal of the international order.<sup>79</sup>

In Iraq, the United States launched a military attack without any popularly declared will for intervention or change in political arrangements.<sup>80</sup> The U.S.-led political trustee resisted early local

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75. See Rogers M. Smith, *Legitimizing Reconstruction: the Limits of Legalism*, 108 YALE L. J. 2039, 2039–40 (1999). (characterizing Abraham Lincoln's View "All governments. . . derive their powers from the consent of the governed"); Stuart Ford, OSCA National Minority Rights in the United States: the Limits of Conflict Prevention, 23 SUFFOLK TRANSNAT'L L. REV. 1, 8 (1999). (quoting OSCE sources "will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government.")

76. See Karen Heymann, *Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust*, 19 AM. U. INT'L L. REV. 153, 177-180 (2003) (discussing utility of plebiscites, referenda, and other elections in resolving claims to self-determination). If a people have voted to secede, their vote tends to increase the legitimacy of international intervention to give effect to their desires expressed at the ballot box.

77. See Political Trusteeship, *supra* note 1, at 398–404 (discussing antecedents of war in Bosnia, including declaration of independence after referendum, discussing the declaration of independence in Kosovo and discussing antecedents of international intervention in East Timor).

78. See THOMAS CAROTHER, *AIDING DEMOCRACY ABROAD* 9 (1999) (criticizing preoccupation with elections at the expense of other elements of democratization); *id.* at 91 (explaining emphasis on elections in democratization efforts); *id.* at 135 (explaining that international community emphasizes elections to get legitimate government in place quickly and facilitate exit strategy).

79. President George W. Bush, remarks at the 20<sup>th</sup> Anniversary of the National Endowment for Democracy (Nov. 6, 2003), *available at* <http://www.ned.org/events/anniversary/oct1603-Bush.html> (last visited June 24, 2004) ("In the early 1970s, there were about 40 democracies in the world. As the 20th century ended, there were around 120 democracies in the world—and I can assure you more are on the way.").

80. No elections in Iraq before the U.S. invasion in March, 2003, produced any calls for deposing the Saddam Hussein regime or for international intervention to depose him.

demands for elections and instead appointed members of the Governing Council, seeking to validate the exercise of power by local political leadership and institutions.<sup>81</sup> Further, the trustee backed off from expressed plans to write a constitution and subject it to electoral approval before turning over power to the appointed institutions.<sup>82</sup>

Democratic elections as a source of international legitimacy have thus played no role in Iraq so far. The Bush Administration apparently envisioned, not early democratic elections, but spontaneous "emergence" of representative leadership.<sup>83</sup> Now, elections are scheduled for January, 2005, but it is not clear as of this writing whether they will be held, or if held, successful.

#### 4. *Enforce Human Rights*

When political trustees enhance recognition and enforcement of human rights, they enjoy greater international legitimacy. One of the changes in the international law of sovereignty and non-intervention, codified in Article 2(4) of the U.N. Charter, is the growing recognition that egregious human rights abuses can justify international intervention notwithstanding opposition by the sovereign committing the abuses.<sup>84</sup> Part of the justification for the U.S.-led attack against Iraq was Saddam Hussein's abuse of human rights within Iraq. As the U.S.-led attack against Iraq began, President Bush claimed that the war and the removal of Saddam Hussein from power would enhance human rights in Iraq.<sup>85</sup>

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81. See Joel Brinkley, *U.S. Rejects Iraqi Plan to Hold Census by Summer*, N.Y. TIMES, Dec. 4, 2003, at page A18, col. 1; Archie Tse, *A Region Inflamed: Baghdad Politics, Then and Now; In Dispute: The Caucus Plan*, N.Y. TIMES, Dec. 1, 2003, at page A11, col. 1 (both reporting on U.S. resistance to early post-invasion elections). See also notes 137-146 *infra* and accompanying text.

82. *Id.*

83. "When you get rid of the reign of fear that Saddam Hussein has wreaked on people who hold their communities together, you're going to see leadership emerge." "And so it's not as if somebody is picking these people; these people are emerging from Iraq. Just as in the exile community, these are people who have emerged because they have fought the long fight and they ought to be a part of Iraq's future." "Ultimately, there will have to be a process of elections and all of the things that go with democracy that will finally affirm what the actual government of Iraq will be. But in this interim stage, there's no reason to believe that the Iraqis cannot help—cannot identify the people who will be a part of the interim Iraqi [administration]." Press Briefing, *supra* note 67.

84. See Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1827 n.16 (2003) (favoring and opposing overriding sovereignty based on human rights abuses by collection authorities); Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT'L & COMP. L. REV. 1 (2002) (reviewing shift toward acceptance of humanitarian intervention).

85. "In a free Iraq, there will be. . . no more executions of dissidents. . . no more torture chambers and rape rooms." Global Message, *supra* note 72.

After President Bush declared the military phase of the intervention complete, the Administration continued to consider the enhancement of human rights as a goal of the political trusteeship.<sup>86</sup> Arguably, Administration's reluctance to have elections that might result in Shiite dominance was consistent with a position aimed at protecting rights of minorities. Nevertheless, the conduct of occupation forces, the absence of judicial review, and the protracted detention of persons without statement of charges or access to counsel raises questions among human rights activists as to the success of the occupying authorities in improving human rights.<sup>87</sup> Prisoner abuse by U.S. armed forces entirely undermined any claim that the intervention effectively enhanced human rights protection.<sup>88</sup>

##### 5. *Develop Governmental Effectiveness*

In seeking international legitimacy for a political trusteeship, nothing succeeds like success. If the early stages of political trusteeship in Iraq had been as successful as the military campaign, some of the international skepticism about the merits of invading and the legitimacy of post-invasion political trusteeship would have dissipated. Instead, the chaos and singular inability of the occupying forces to deliver effective government undermined international legitimacy.<sup>89</sup> It would have been bad enough if the United States had been perceived as having a clear plan for its political trusteeship after Saddam Hussein was deposed and then had difficulty turning it into reality. It was far worse that there was no plan and, apparently, indifference to the need for a plan. This reinforced international perceptions that the United States was committed to belligerent unilateralism in the military sphere but

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86. United States Department of State, *Interview of the President by Al-Sharq Al-Awsat* (Nov. 19, 2003), available at <http://www.state.gov/p/eur/rls/rm/2003/26561pf.htm> (last visited June 24, 2004) (referring to a basic law to protect individual rights and minority participation in Iraqi government before power is transferred, even if constitution is not written before then).

87. See Amnesty International, *Reconstruction After the War in Iraq – The Human Rights View* (Aug. 2003), available at <http://web.amnesty.org/web/wire.nsf/August2003/Iraq> (last visited June 24, 2004) (criticizing the lack of accountability of the occupying authority and at those participating in reconstruction). Iraq: Amnesty International reveals a pattern of torture and ill-treatment, available at <http://web.amnesty.org/pages/irq-torture-eng> (last visited July 8, 2004).

88. *Id.*

89. Fareed Zakaria, *Our Last Real Chance*, NEWSWEEK, Apr. 19, 2004, at 44. (reporting on poor planning by Bush administration, leading to lack of security and legitimacy in violent post-invasion Iraq); Babak Dehganpiseh et al., *We are Your Martyrs*, NEWSWEEK, Apr. 19, 2004, at 36. (reporting on failure of U.S. to anticipate sources of violent resistance in post-invasion Iraq).



was incapable of appreciating the complexity of successful nationbuilding.<sup>90</sup>

The widespread looting in the earliest days of the political trusteeship was obviously a bad start; and continued inability of the political trustee to provide basic security undercuts any perception that the trusteeship was effective even on the basics.<sup>91</sup> Continued lack of transparency and accessibility to the general Iraqi public, dumping the first civil administrator, Jay Garner, two major zigzags on approaches to elections and writing a constitution all reinforce the perception of the Iraq trusteeship as bumbling rather than effective.<sup>92</sup> Garner, the former civil administrator, acknowledged poor planning and reported an order by Secretary of Defense Donald Rumsfeld that he dismiss Tom Warrick, the State Department official responsible for an extensive State Department study on post-war planning in Iraq—a study which forecast extensive looting, among other things.<sup>93</sup> This is evidence of indifference to the efficacy of post-invasion governmental effectiveness.

Escalating violence throughout 2004 continued to thwart the goal of effective government.

#### 6. *Install Charismatic Leadership*

Charismatic leadership of the political trustee at the outset of trusteeship enhances international legitimacy. A charismatic foreign administrator like Douglas MacArthur in Japan, or a charismatic local like Winston Churchill, can build international support simply by asking for it and working to obtain it.<sup>94</sup> In Iraq, there was no such leadership.

The United States government apparently thought that Ahmad Chalabi might play this role but his capacity to mobilize international public opinion in his favor was largely frustrated by initial perceptions that he has a corrupt past, growing perceptions that he had little support

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90. See Zakaria, *supra* note 89.

91. *Id.*

92. See Tamara Lipper et al., *About-Face in Iraq*, NEWSWEEK, Nov. 24, 2003, at 30 (reporting on reversals of course in U.S. post-invasion administration of Iraq).

93. Warrick had earned the enmity of the Bush Administration by opposing the deference the Defense Department gives to Iraqi exiles during the planning process. See Lawrence F. Kaplan, *The State Department's Anti-Democracy Plan for Iraq*, NEW REPUBLIC, Nov. 2003 (reporting that Warrick tried to bar participation by the Iraqi National Congress in planning meetings). The order to dismiss Warrick apparently came from Vice President Cheney. *Id.*

94. MacArthur was a paradigmatic leader of a political trusteeship with charisma reaching into the international community. Churchill is an example, not of a leader involved in a political trusteeship, but of a national leader who projected his charisma abroad to build international support, especially in the United States.

from within Iraq and, later, by charges that he spied for Iraq.<sup>95</sup> But at least he was willing to play the role, actively working to build support in key constituencies at the United Nations and the United States, as well as those in Iraq.<sup>96</sup> American and other international leaders have been less successful. General Jay Garner, the initial choice to lead the political trusteeship was singularly ill-suited, lacking political or diplomatic experience and apparently thought to be qualified only because Secretary of Defense Donald Rumsfeld knew him personally.<sup>97</sup> Ambassador Bremer seemed to be a better choice, presenting a buttoned-down diplomatic persona reinforced by confidence and an aura of competence.<sup>98</sup> However, he never seemed to campaign actively either in foreign capitals or with the Iraqi population. It is not clear that ordinary observers would characterize him as “charismatic.”<sup>99</sup> It remains to be seen whether U.S.-picked Prime Minister Iyad Allawi will prove more charismatic. In his election-season trip to the U.S. his performance best can be described as “wooden.”

In any event, the leadership element of the political trusteeship in Iraq would be better served by an experienced effective democratic politician such as Paddy Ashdown as High Commissioner in Bosnia.<sup>100</sup> The appointment of U.N. High Commissioner for Human Rights Sergio

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95. Compare Max Singer, *After Saddam: The Controversy over Ahmad Chalabi*, NATIONAL REVIEW ONLINE, June 20, 2002, available at <http://www.nationalreview.com/comment/comment-singer062002.asp> (last visited June 24, 2004) (reporting controversy over whether Chalabi “has the potential to be one of the great Arab leaders of this century” or whether he is a small time opportunist and playboy trying to use his position in the Iraqi National Congress to make something for himself”) with David Corn, *Postwar Democracy? Iraq is a Hard Place*, THE NATION, Mar. 26, 2003, available at <http://www.thenation.com/capitalgames/index.mhtml?bid=3&pid=519> (last visited June 24, 2004) (describing most Iraqis and U.S. military veterans as suspicious of Chalabi, “a millionaire Ahmed Chalabi, who has lived outside Iraq since 1956 and who was convicted of financial fraud in Jordan in 1992. (He claims it was a set-up.)”). Those who know him variously characterize Chalabi as “intelligent and charming,” and of “dubious integrity.” See James Risen & David Johnston, *The Reach of the War: The Offense: Chalabi Reportedly told Iran that U.S. Had Code*, N.Y. TIMES, June 2, 2004, at 1 (reporting on claims that Chalabi compromised U.S. intelligence secrets to Iran).

96. Dexter Filkins, *The Struggle for Iraq: Leadership; Chalabi, Nimble Exile, Searches for Role in Iraq*, N.Y. TIMES, Mar. 26, 2004 at A10 (reporting on Chalabi’s energetic efforts to build support for various constituencies).

97. Michael Hirsh, *The State Dept. Wins One*, NEWSWEEK, Apr. 30, 2003, National Affairs section (reporting on replacement of Garner by Bremer, noting Garner’s relationship with Rumsfeld).

98. See Michael Hirsh, *Racing the Clock in Iraq*, NEWSWEEK, Feb. 9, 2004, at 32 (reporting on Bremer’s administration of Iraq).

99. *Id.*

100. See Gerald Knaus & Felix Martin, *Travails of the European Raj*, available at <http://www.journalofdemocracy.org/articles/KnausandMartin.pdf> (last visited July 8, 2004).

Vieira de Mello as the top UN official in Iraq was a step in the right direction. But he had barely begun when he was assassinated; a major setback to installing charismatic leadership at the head of the political trusteeship.<sup>101</sup>

### *7. Bring an End to National-Stage Conflicts*

The justification for international intervention into the affairs of a state often relates to inability—or unwillingness—of the existing government to protect human rights and to maintain minimal physical security. A political trustee gains international legitimacy when it demonstrates the capacity to end—or at least to control—conflicts on the national stage. In Iraq, part of the basis for continued international sanctions and restrictions such as no-fly zones was to prevent human rights abuses of the Kurds and of other ethnic or religious groups opposed to Saddam Hussein.<sup>102</sup>

If the U.S.-led occupation had mitigated these underlying intra-Iraq conflicts, it might have attracted some measure of international legitimacy for its intervention. But as of December 2003, the intervention had not reduced national-stage conflicts between Sunni and Shi'a Muslims and between these groups and the Kurds.<sup>103</sup> Indeed, the CPA regularly was caught off guard by these conflicts, and was forced to back away from its insistence that the Governing Council write a constitution because ethnic and religious conflicts within the Governing Council made writing a constitution infeasible.<sup>104</sup>

Apart from insisting that the Governing Council proceed with a process for becoming more effective and preparing to receive more authority, the CPA revealed no real plan for bridging the conflicts that had undermined the Council's effectiveness. Neither the Bush Administration nor the CPA advanced any new ideas, such as the one advanced by Leslie Gelb on November 25, 2003, to divide Iraq into three separate states, or largely autonomous areas within a formal

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101. Dexter Filkins & Richard A. Oppel, Jr., *After the War: Truck Bombing; Huge Suicide Blast Demolished U.N. Headquarters in Baghdad; Top Officials Among 17 Dead*, N.Y. TIMES, Aug. 20, 2003, at 1 (reporting on attack that Killed Viera).

102. No-fly zones: The Legal Position, Feb. 19, 2001, available at [http://news.bbc.co.uk/1/hi/world/middle\\_east/1175950.stm](http://news.bbc.co.uk/1/hi/world/middle_east/1175950.stm) (last visited July 8, 2004) (describing the purpose of no-fly zones as protecting Kurds and Shi'a Muslims).

103. *How to Rebuild Iraq*, PEACE WATCH ONLINE NO. 2, 10 (June, 2004) at <http://www.usip.org/peacewatch/2004/6/iraq4.html> (last visited July 8, 2004) (discussing inter-ethnic and inter-religious conflicts in post-invasion Iraq).

104. FALEH A. JABAR, POSTCONFLICT IRAQ: A RACE FOR STABILITY, RECONSTRUCTION, AND LEGITIMACY, U.S. INSTITUTE OF PEACE, SPEC. REP. NO. 120 (2004).

Iraq.<sup>105</sup> As of this writing, not only does the Iraq intervention not draw international legitimacy from its effectiveness in ending national-stage conflicts, it looks like it is creating a situation in which these conflicts may become more problematic than they were under the preceding regime—in terms of political stability, if not human rights protection.

### *C. Failure to Achieve Internal Legitimacy*

*Political Trusteeship* argues that political trusteeships are unlikely to succeed unless they build internal legitimacy, which, in turn, depends on delivering effective government, promoting governmental transparency, providing mechanisms for judicial review, promoting popular confidence in local institutions, respecting indigenous personal and group pride, implementing structures compatible with common ideology, and harnessing tribal custom.<sup>106</sup> These tests for internal legitimacy overlap the prescriptions for building a liberal democracy, considered in Part II.D.

The Bush Administration's intervention in Iraq deserves no higher marks for its quest for internal legitimacy than for its failure to obtain international legitimacy. Difficulties in obtaining internal legitimacy for the political trusteeship in Iraq are due, not to flaws in the approaches being pursued by mid-2004, but to the absence of any coherent plan for civil administration before the occupation began.<sup>107</sup> Early mis-steps in civil administration may have undermined internal legitimacy to such an extent that belated attention to the hallmarks of internal legitimacy came too late. Nevertheless, the experience in Iraq may provide useful nationbuilding lessons for the future. Iraq may be viewed in retrospect as an opportunity lost, where success was jeopardized by the failure to apply lessons learned from past political trusteeships from the outset, instead relying on a naïve expectation that a liberal democracy would fall into place spontaneously as soon as Saddam Hussein was removed by military force.

#### *1. Deliver Effective Government*

Governmental effectiveness, beginning with basic security—"law and order"—is a powerful foundation for internal legitimacy. As *Political Trusteeship* pointed out, instances abound in which a local

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105. Leslie H. Gelb, *The Three-State Solution*, N.Y. TIMES, Nov. 25, 2003, at A27.

106. Political Trusteeship, *supra* note 1, at 442 (summarizing bases of internal legitimacy).

107. JABAR, *supra* note 104 (describing pre-war plan for administration of Iraq as "sketchy" in contrast to robust military plans).

population was willing to forgive other shortcomings of a government that could deliver security and basic governmental services.<sup>108</sup> If the U.S.-led occupation had produced an Iraq without Saddam Hussein, with the same levels of electricity, public order, and employment as Saddam Hussein provided, then it would have enjoyed a base level of internal legitimacy on which to build, permitting construction of the institutions of liberal democracy. However, this did not happen. Things got worse much worse for ordinary Iraqis after the U.S. military occupied Iraq.<sup>109</sup> Any increment of internal legitimacy attributable to more effective government is yet to be seen—if it ever can be achieved, given the poor start.

## 2. *Promote Governmental Transparency*

As *Political Trusteeship* points out, any trusteeship inherently creates confusion about what the law is, who is in charge, and where to go to resolve uncertainties or disputes. Transparency of the trusteeship mitigates the confusion.<sup>110</sup> The Iraq Emergency Supplemental Appropriation Act recognizes the need for transparency in certain activities of the CPA by requiring that reports be posted on the Internet.<sup>111</sup>

The U.S.-led political trusteeship in Iraq gets mixed marks on transparency. To its credit, the CPA, unlike its Reconstruction Authority predecessor under General Garner, had a website, including the full text of regulations and orders issued by the Administrator of the CPA.<sup>112</sup> On the other hand, as Part II.A explains, the legal framework for the CPA was vague and the content of the CPA website did not answer important questions about the chain of command for CPA decisions.<sup>113</sup> Also, even as the CPA made a point of transferring more

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108. *Political Trusteeship*, *supra* note 1.

109. JABAR, *supra* note 104 (reporting on complete breakdown in law and order and in functioning of infrastructure after U.S. led invasion).

110. *Political Trusteeship*, *supra* note 1, at 444–45.

111. The Act requires that certain reports be posted on the CPA website. See Iraq Emergency Supplemental Appropriation Act § 2215(a)(3), Stat. at 1232 (oil production reports); Iraq Emergency Supplemental Appropriation § 3001(i)(4), Stat. at 1237 (quarterly Inspector General reports to Congress), *available at* [http://www.export.gov/iraq/pdf/public\\_law\\_108-116.pdf?dbname=108\\_cong\\_public\\_laws&docid=f:publ106.108.pdf](http://www.export.gov/iraq/pdf/public_law_108-116.pdf?dbname=108_cong_public_laws&docid=f:publ106.108.pdf) (last visited June 24, 2004).

112. See Coalitional Provisional Authority, at <http://www.cpa-iraq.org> (last visited June 24, 2004).

113. The website has links for “Documents,” “Pillars,” and “Links” but none of those leads to any primary or secondary source that explains the sources of CPA authority.

authority to the Governing Council, the Governing Council was completely non-transparent, with no website of its own, or even a link from the CPA website as of the end of 2003.<sup>114</sup> The Interim Iraqi Government had no website nearly six months after its creation.

### 3. *Provide Mechanisms for Judicial Review*

When any authority makes governmental decisions, international legitimacy will be impaired unless those affected by the decisions have some place they can go to test the legality of the decisions. As *Political Trusteeship* points out, the international community insists on rule of law in countries attracting international attention.<sup>115</sup> Any prescription for rule of law starts with the opportunity for judicial review of governmental decisions. To earn internal legitimacy for a political trusteeship justified in any part by the need to establish a rule of law, the political trustee must provide some mechanism for judicial review.

The Iraq Emergency Supplemental Appropriation Act provides for an independent Inspector General with limited oversight responsibilities, but otherwise neither the U.S. nor the Interim Iraqi Government has done anything to afford tribunals within which the legality of trustee decisions can be tested.<sup>116</sup> It is not inconceivable that someone could file a civil action in a United States District Court seeking review under the U. S. Administrative Procedure Act of decisions by some component of the CPA.<sup>117</sup> Litigating the merits of CPA decisions in this context is surely inferior to litigating them in some specialized tribunal which might be established by the CPA.

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114. After the June, 2004 transfer of power, the CPA website had links to information on the "new sovereign Iraq" on the U.S. Embassy in Iraq website, <http://iraq.usembassy.gov>. That website, however, contains nothing concrete on the structure or authority of the new Iraqi government, and has no link to a website for the new government. See [http://iraq.usembassy.gov/iraq/addition\\_links.html](http://iraq.usembassy.gov/iraq/addition_links.html) (last visited July 8, 2004).

115. *Political Trusteeship*, *supra* note 1, at 445.

116. The Act establishes an Inspector General of the Coalition Provisional Authority, appointed by the Secretary of Defense, who must report to the Congress on the use of appropriated funds and monitor and review reconstruction activities. Iraq Emergency Supplemental Appropriation Act, *supra* note 111, § 3001, Stat. at 1234–35. The Inspector General also has the same duties and responsibilities as other inspectors general under the Inspector General Act of 1978. *Id.* § 3001(f)(2), Stat. at 1236. The Inspector General must report quarterly to the Congress on the activities of the CPA. *Id.* § 3001(i), Stat. at 1237.

117. This author presented this possibility in a question in his final examination to a class in Administrative Law in the Spring of 2003. The exam answers suggested the possibilities.

#### 4. *Promote Popular Confidence in Local Institutions*

As political trusteeships are justified by their goal of preparing local populations for self-government, their internal legitimacy, is measured in part by their success in establishing local institutions that themselves enjoy local legitimacy. The record of the U.S.-installed institutions of local government is weak in terms of local legitimacy. Although the Governing Council was carefully balanced by ethnicity and religion, it comprised individuals with weak support in local constituencies. The institutions' reputation for being puppets of the United States is warranted. At the end of November 2003, there was no apparent plan for shoring up the legitimacy of local institutions except for vague hopes that legitimate leaders would somehow "emerge." A year later, it was not clear that the Interim Iraqi Government was fairing much better.

#### 5. *Respect Indigenous Personal and Group Pride*

Internal legitimacy of government institutions in any society is determined in large part by the attitudes of opinion leaders. These elites lead institutions that form part of the social fabric of the local society. Affronts to the pride of such leaders and affronts to the dignity of individuals make support from these sources less likely.

Aggressive tactics by U.S. forces in Iraq, while appropriate to gather intelligence and to combat terrorist cells, are inevitably imprecise and regularly offend local sensibilities. Any foreign military force faces obstacles because occupation is an affront to local aspirations for autonomy.

Although some commanders have avoided psychological assaults on local customs and mores, the U.S.-led occupation of Iraq began with a public and explicit indifference to these issues. It was slow and ineffective to shape trustee behavior needed to enlist support based on local pride, rather than undermining it.

#### 6. *Implement Structures Compatible with Common Ideology*

As *Political Trusteeship* explains, ideology is a powerful source of legitimacy.<sup>118</sup> This is especially true in states where Islam predominates because Islamic doctrine integrates religion and politics.<sup>119</sup> Antagonism

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118. Political Trusteeship, *supra* note 1, at 452. See generally IDEAS & FOREIGN POLICY: BELIEFS, INSTITUTIONS AND POLITICAL CHANGE (Judith Godstein & Robert O. Keohane, eds., 1993) (arguing that ideology plays a role, and challenging purely rationalist approached to international relations theory).

119. HAIFA ALANGARI, THE STRUGGLE FOR POWER IN ARABIA 176 (1998) [hereinafter

against an outside force also can be a potent ideology.<sup>120</sup> In Iraq and other parts of the Arab world, Islamic fundamentalism combines with anti-Westernism, as religious leaders blame Western imperialism and cultural influences for humiliation suffered by the Muslim World.<sup>121</sup>

As Part II.B § 7 explains, disagreements over the role that Islam should play in a new Iraqi Constitution frustrated early efforts to write a constitution.<sup>122</sup> Columnist Thomas Friedman argues that the struggle over the future of Iraq is fundamentally a struggle between anti-American elements who seek to portray the U.S. as anti-Muslim and the United States. The United States is a country whose credibility in this struggle is greatly impaired because President Bush lets “one of [his] top generals and [his] pals on the Christian right spew hate against the Prophet Muhammad,” which strengthened the will of young anti-Americans.<sup>123</sup>

### 7. *Nurture Charismatic Leadership*

Charismatic leadership enhances internal and international legitimacy.<sup>124</sup> The political trusteeship in Iraq has so far failed to enlist a charismatic local leader in support of its enterprise. Ahmad Chalabi is, by some accounts charismatic but he is not really “local” having lived in exile since 1956.<sup>125</sup> Prime Minister Iyad Allawi projects a tough demeanor, which appeals to many Iraqi’s, but his political closeness to the Bush Administration undermines his local support.

Other possibilities existed at the end of the military campaign. One of the most promising candidates while under protection of U.S. forces, the very charismatic and pro-U.S. Ayatollah Abdul Majid Al Khoei, was assassinated on April 10, 2003 in Najaf.<sup>126</sup> Others now include

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“Alangari”] (describing how Ibn Saud used Wahhabism, a fundamentalist Muslim revivalist movement, to consolidate his political power, and to overcome the limits of coercion as a means of controlling tribal rivalries).

120. “It is a universal political maxim that the absence of a common antagonist focuses aggression inward and splits the society.” *Id.* at 27.

121. BERNARD LEWIS, WHAT WENT WRONG? WESTERN IMPACT AND MIDDLE EASTERN RESPONSE 158 (2002) (describing movement that “attribute[es] all evil to the abandonment of the divine heritage of Islam”).

122. JABAR, *supra* note 104 (describing how inter-ethnic and inter-religious factionalism undercut effort to write constitution).

123. Thomas L. Friedman, *Letter From Tikrit*, N.Y. TIMES, Nov. 27, 2003.

124. *See supra* Part II.B.6 (evaluating charisma as source of international legitimacy).

125. *See supra* Part II.B.6 (describing conflicting perceptions of Chalabi).

126. Leela Jacinto, *Murder in the Mosque, U.S. at a Loss After Killing of Senior Iraqi Shiite Cleric*, ABC News (Apr. 14, 2003), available at [http://abcnews.go.com/sections/world/Primetime/iraq\\_shia030414.html](http://abcnews.go.com/sections/world/Primetime/iraq_shia030414.html) (last visited June 24,



moderates such as Ayatollah Al-Sistani, who derailed late October U.S. plans for installing a transitional local government without elections, and “radicals” like Muqtada Al-Sadr, who is in his 30s, who is popular among the country’s poor and its youth. So far, the U.S. has made little headway in attracting Al Sadr’s support.<sup>127</sup> He calls for his followers to resist the U.S. occupation.<sup>128</sup> Still other possible candidates are Massoud Barzani or Jalil Talabani, competing Kurdish leaders. Yet, it is hard to imagine that the majority Shiites or the Sunnis would accept Kurdish leadership. Further, these two have a history of putting more effort into fighting each other than cooperating in a common enterprise.

#### 8. *Bring an End to National-Stage Conflicts*

In some cases of international intervention, such as Bosnia, Kosovo and East Timor, the original justification for establishing a political trusteeship was to end internal violence.<sup>129</sup> In such cases, success in ending these national conflicts links directly to the *raison d’être* for the trusteeship and produces internal, as well as international, legitimacy.<sup>130</sup> In other cases, such as Iraq, factors other than intra-state violence justified the intervention, but post-intervention internal conflict can easily undermine internal legitimacy. Iraq is a good example of this process at work. There is support for the U.S.-led political trusteeship has eroded in the face of early looting, food and electricity shortages, and in the absence of any demonstrated capacity for self-government by the U.S.-picked Iraqi Governing Council, or its successor Interim Government. Bold constitutional solutions, such as a three-state approach suggested by former President of the Council of Foreign Relations Leslie Gelb, have not been taken up by the Bush Administration.<sup>131</sup>

#### D. *Failure to Build Liberal Democracy*

*Political Trusteeship* argues that political trustees achieve their objectives in the long term only if they build liberal democracy by designing institutional structures to manage internal political

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127. See Fareed Zakaria, *Our Last Real Chance*, NEWSWEEK, Apr. 19, 2004, at 44. (describing activities of Sistani and al-Sadr, and U.S. failure to enlist their support).

128. *Id.* (describing al-Sadr’s opposition to U.S. occupation).

129. Political Trusteeship, *supra* note 1, at 398—404. (describing bases for international intervention in Bosnia, Kosovo and East Timor).

130. See *supra* Part II.B.7 (discussing ending national-stage conflicts as a source of international legitimacy).

131. See Political Trusteeship, *supra* note 1.

competition.<sup>132</sup> This is accomplished by drawing on unique local experiences, by recruiting and developing appropriate leadership elites, by defining and implementing strategies for economic development and by not letting corruption dominate their agenda.<sup>133</sup> Meeting these objectives supports an exit strategy premised on the trustee turning over more and more responsibility for governance to local institutions that are viable politically and economically and which respect democratic and human rights values.

A liberal democracy in Iraq is an explicit goal of the U.S.-led intervention. About a month into the U.S.-led war to remove Saddam Hussein, National Security Advisor Rice identified rule of law and democracy as important goals.<sup>134</sup> President Bush, in late 2003, talked of democracy as a goal of the political trusteeship in Iraq, identifying the elements of liberal democracy.<sup>135</sup>

The Bush Administration recognizes at some level of abstraction the need to build institutions of liberal democracy, but it has so far grossly overestimated the ease of doing so. The Administration recognizes the need to build political structures for managing internal conflict. It has sought to avoid democratic elections before the mediating institutions of a liberal democracy sprout. It has been

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132. *Id.*

133. See generally Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

134. "Our goals are clear: We will help Iraqis build an Iraq. . .that respect[s] the rights of Iraqi people and the rule of law; and that is on the path to democracy." Press Briefing, *supra* note 67.

135. "In Iraq, the Coalition Provisional Authority and the Iraqi Governing Council are also working together to build a democracy." President George W. Bush, Remarks at the 20<sup>th</sup> Anniversary of the National Endowment for Democracy (Nov. 6, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/11/20031106-3.html> (last visited June 24, 2004). "The failure of Iraqi democracy would embolden terrorists around the world, increase dangers to the American people, and extinguish the hopes of millions in the region. Iraqi democracy will succeed—and that success will send forth the news, from Damascus to Teheran—that freedom can be the future of every nation." *Id.* "There are, however, essential principles common to every successful society, in every culture. Successful societies limit the power of the state and the power of the military—so that governments respond to the will of the people, and not the will of an elite. Successful societies protect freedom with the consistent and impartial rule of law, instead of selecting applying—selectively applying the law to punish political opponents. Successful societies allow room for healthy civic institutions—for political parties and labor unions and independent newspapers and broadcast media. Successful societies guarantee religious liberty—the right to serve and honor God without fear of persecution. Successful societies privatize their economies, and secure the rights of property. They prohibit and punish official corruption, and invest in the health and education of their people. They recognize the rights of women. And instead of directing hatred and resentment against others, successful societies appeal to the hopes of their own people." *Id.*

deliberate in its effort to identify appropriate local and external elites.

Abandoning a foolish early myth that the occupation army would be uniformly embraced, it came to recognize by late October that intolerance for the occupying forces was high and building. Ultimately, any sound exit strategy needs to result in a turnover of governmental power before legitimacy of the trustee breaks down completely. In other words, the necessity for a coherent and practicable exit strategy, considered in Part II.E, collides with the goal of developing a liberal democracy.<sup>136</sup> Working under increasing time pressure, the Bush Administration formulated reasonably coherent concepts for evolving the initial Interim Governing Council into a more effective and more representative Iraqi interim government.<sup>137</sup> The goal was to improve representation, while at the same time deferring popular elections until more progress had been made on erecting mediating institutions.

Often the implementation of the prescriptions was flawed and naive, or driven by ideology or cronyism. This should not obscure the reality that many of the basic policy pillars were sound.

*1. Design Institutional Structures to Manage Internal Political Competition, Drawing on Unique Local Experiences*

Liberal democracy signifies, among other things, the capacity of democratic political institutions to manage inter-group conflict. The challenge is greater when ethnic and religious differences reinforce mere political differences. The test of viable democracy is not only a willingness to compete for political power through established institutions, but also to be willing to lose without organizing a coup or starting a civil war.

The United States feared that Shiite dominance of any popularly elected Iraqi government would suppress Sunni and other minority elements, possibly leading to a rebellion of Sunnis against a new Iraqi government.<sup>138</sup> The U.S. sought to reduce this possibility by writing a constitution to protect minority rights before elections were held by transferring significant power to a new local government.<sup>139</sup> The plan was abandoned in light of worsening security and growing calls for an

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136. Political Trusteeship, *supra* note 1, at 467—71. (explaining how exit strategy must be coordinated with development of institutions of liberal democracy, lest opposition to continued trusteeship force premature withdrawal).

137. See JABAR, *supra* note 104, at 8—10. (describing establishment of Governing Council and its ethnic balance).

138. *Id.* (describing U.S. concerns about Shiite dominance).

139. *Id.* (describing efforts to broker a constitution).

early transfer of power.<sup>140</sup> The new plan called for the Iraqi Governing Council and local governments to choose a “transitional assembly,” comprising several hundred Iraqis representing geographical and social sectors.<sup>141</sup> That assembly would have established an “interim government,” which would write a constitution in June 2004.<sup>142</sup>

The plan unraveled when Grand Ayatollah Ali al-Sistani, a powerful Shiite cleric, insisted on direct elections of representatives to write a constitution.<sup>143</sup> The U.S. believed that direct national elections could not be held without voter rolls, which could not be constructed without a census.<sup>144</sup> The U.N. had proposed using a food-rations registry to qualify voters, but Saddam Hussein had used the registry to reward his supporters and punish his enemies. At the end of November, the U.S. explored the possibility that a system of provincial and local elections, town meetings and causes of civil leaders might meet the Grand Ayatollah’s demands.<sup>145</sup> In addition, the Governing Council backed away from its original agreement that it would be dissolved when the transitional assembly was selected, instead remaining to function as a kind of legislative senate.<sup>146</sup> Working out a plan was complicated by the perception, expressed both by Shiite members of the Governing Council and by Ahmad Chalabi, that “the whole thing was set up so President Bush could come to the airport in October for a ceremony to congratulate the new Iraqi government,” thus supporting his bid for reelection.<sup>147</sup>

## *2. Recruit Leadership Elites from Outside and Inside the Trust Territory*

Liberal democracy requires political elites who can provide leadership to competing parties and factions while respecting the norms of democracy and a rule of law. The Bush Administration apparently

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140. Steven R. Weisman, *Sensing Shiites Will Rule Iraq, U.S. Starts to See Friends, Not Foes*, N.Y. TIMES, Nov. 20, 2003.

141. JABAR, *supra* note 104, at 10–11. (describing U.S. approach and Sistani’s opposition).

142. Joel Brinkley and Ian Fisher, *U.S. Plan in Iraq to Shift Control Hits Major Snag*, N.Y. TIMES, Nov. 27, 2003, at 1 [hereinafter Brinkley & Fisher].

143. The Grand Ayatollah enjoyed an effective veto on plans for governmental transformation because of his influence with the 12 Shiite members of the 24-member Governing Council. Brinkley & Fisher, *supra* note 142.

144. JABAR, *supra* note 104, at 16. (concluding that free and fair elections are not possible without accurate voter rolls).

145. Brinkley & Fisher, *supra* note 142.

146. *Id.*

147. *Id.*

envisioned, not early democratic elections, but spontaneous “emergence” in Iraq of representative leadership.<sup>148</sup>

Any political trustee inherits a reality in which the interaction of political elites has gone awry. Accordingly, one of the essential responsibilities of a political trustee is to vet those aspiring to leadership positions, and to recruit elites for under-represented groups. Early post-war initiatives in Iraq reflected pursuit of both responsibilities. The administrator of the CPA issued an order banning senior Baath Party members from employment with the government or with public institutions.<sup>149</sup> Some ministers in the interim government were exiles, who spent years “polishing a plan to de-Baathify Iraq once Saddam Hussein was gone.”<sup>150</sup>

Eliminating Baath Party members from leadership positions proved difficult.<sup>151</sup> In some cases, local Iraqi leaders and their American Army counterparts have been reluctant to remove Party members because “throwing people of authority and expertise onto the street” would fuel resistance to the occupation.<sup>152</sup> In other cases, they cannot be identified because they altered databases and other records to conceal their Baath Party involvement.<sup>153</sup> In many cases, their expertise is needed to run the country and its institutions. At first, the Bush Administration sought to reduce likely Shiite dominance of any elected Iraqi government, but gradually accommodated itself to the reality that Shiites would likely govern Iraq, reconciling them to this inevitability by realizing that the Shiite movement is not monolithic and would not necessarily be influenced by outside forces in Iran and elsewhere.<sup>154</sup>

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148. “When you get rid of the reign of fear that Saddam Hussein has wreaked on people who hold their communities together, you’re going to see leadership emerge. “And so it’s not as if somebody is picking these people; these people are emerging from Iraq. Just as in the exile community, these are people who have emerged because they have fought the long fight and they ought to be a part of Iraq’s future. “Ultimately, there will have to be a process of elections and all of the things that go with democracy, that will finally affirm what the actual government of Iraq will be. But in this interim stage, there’s no reason to believe that the Iraqis cannot help—cannot identify the people who will be a part of the interim Iraqi [administration].” Press Briefing, *supra* note 67.

149. Coalition of Provisional Authority Order No. 1, at [http://www.iraqcoalition.org/regulations/20030516\\_CPAORD\\_1\\_De-Baathification\\_of\\_Iraqi\\_Society\\_.pdf](http://www.iraqcoalition.org/regulations/20030516_CPAORD_1_De-Baathification_of_Iraqi_Society_.pdf) (last visited June 24, 2004).

150. Susan Sachs, *Baathists, Once Reviled, Prove Difficult to Remove*, N.Y. TIMES, Nov. 22, 2003, at A7.

151. *Id.*

152. *Id.*

153. *Id.*

154. Weisman, *supra* note 140.

### 3. *Define and Implement Strategies for Economic Development*

Political trustees cannot achieve their political and security objectives unless they pay as much attention to building a sustainable economy in the trust territory as they do to human rights, rule of law, and constitution writing. Declining standards of living and frustrated aspirations for economic advancement are powerful sources of political instability. In Iraq, the U.S.-led occupation recognized the importance of economic development, but was unable, for its first eighteen months, to link its plans for reconstruction and reform of the Iraqi economy with establishment of basic law and order and the rebuilding of the local institutional apparatus necessary to allow private sector initiative to succeed.

The political trustee in Iraq gave appropriate prominence to economic development. On the top level of the CPA website was an "Economy" button, which branched into foreign investment, financial market construction, transparency in accounting, public sector finance, private sector development, strengthening science and technology, public sector management reform, and private bank information.<sup>155</sup> These categories should receive attention early in any political trusteeship, along with development of appropriate macro-economic policies and infrastructure.

A separate Iraqi Business Center website, linked to from the top page of the CPA website, offers assistance to foreigners and Iraqis seeking to start or to maintain businesses, including information on opportunities in agriculture, construction, manufacturing, information technology, oil services and tourism.<sup>156</sup> Little useful information is provided on the site. The sole content of the tourism page is a document containing two short paragraphs suggesting that "[a] tourist project suggested to be buildup in north of Iraq, which has the perfect means of such project, especially that the North is almost missing for such kind of modern and new style of projects."<sup>157</sup> The website provides for online

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155. The content of the web pages associated with these categories is sparse, however, mostly reporting on CPA philosophy and aspirations. As of Nov. 30 2003, the only factual and documentary content was a link to the CPA foreign investment law, to the two national budgets, and to telephone contact information for more than a dozen private banks. Coalition Provisional Authority, at <http://www.cpa-iraq.org/economy.html> (last visited June 24, 2004).

156. See *generally* Business Center, *available* at [http://iraqcoalition.org/business\\_center.html](http://iraqcoalition.org/business_center.html) (last visited July 8, 2004).

157. Tourism Village or Hotel, *at* [http://iraqibusinesscenter.org/Private\\_sector/Iraqi2outsiders/Tourism/TOURIST%20VILLAGE%20OR%20HOTEL.doc](http://iraqibusinesscenter.org/Private_sector/Iraqi2outsiders/Tourism/TOURIST%20VILLAGE%20OR%20HOTEL.doc) (last visited Mar. 30, 2004).

business registration, which is a desirable feature.<sup>158</sup> The Business Center website links to a separate U.S. Department of Commerce website, which provides a digest of applicable law in Iraq, an up-to-date summary of business conditions in Iraq and answers frequently asked questions.<sup>159</sup>

In November 2003, the U.S. arm of the International Chamber of Commerce—the United States Council for International Business (USCIB)—worked with the Iraqi-American Chamber of Commerce and Industry and the International Chamber of Commerce (“ICC”), the world business organization. Together the organizations worked to improve enforceable resolution of business disputes relating to Iraq and otherwise to improve the legal and security situation for business.<sup>160</sup> The Iraqi-American Chamber of Commerce and Industry has a website that includes surveys and news stories about business conditions in Iraq and a link to neoconservative views about American foreign policy.<sup>161</sup>

According to an August 2003 survey of 600 businesses in Iraq, the principal barriers to economic progress were lack of modern economic laws, legal uncertainty, insufficient access to credit, and unreliable electricity.<sup>162</sup> The survey revealed that a significant majority of respondents expected conditions for business to improve.<sup>163</sup> It is not clear what affect the growing levels of terrorist violence after August, 2003 had on these perceptions.<sup>164</sup>

The economic initiatives in Iraq represent a model for how to provide information on business opportunities during a political trusteeship. Unfortunately, failure of other aspects of the political trusteeship in Iraq, accompanied by continuing threats of terrorist attacks on foreigners, frustrates implementation of plans for private-sector-oriented economic development.

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158. *Id.*

159. Iraq Investment and Reconstruction Task Force, at <http://www.export.gov/iraq> (last visited June 24, 2004). The summary provides information on such practical issues as local security firms, telephone service, visas, border entry points, and means of transporting goods into and out of the country. *Id.*

160. *Getting back to business in Iraq*, at [http://www.iccwbo.org/home/news\\_archives/2003/stories/iraq\\_chamber.asp](http://www.iccwbo.org/home/news_archives/2003/stories/iraq_chamber.asp) (last visited June 24, 2004).

161. Iraqi American Chamber of Commerce and Industry, at <http://i-acci.org/> (last visited June 24, 2004).

162. Conditions and Expectations for Private Enterprise in Iraq, at [http://www.cipe.org/pdf/iraq\\_survey\\_final.pdf](http://www.cipe.org/pdf/iraq_survey_final.pdf) (last visited June 24, 2004).

163. *See* Reporting Corruption, at [www.iraqbusinesscenter.org](http://www.iraqbusinesscenter.org). (last visited July 8, 2004).

164. Political Trusteeship, *supra* note 1, at 467.

#### 4. *Do not let Corruption Dominate the Agenda*

Successful political trusteeship requires simultaneous effort and progress on a variety of political, legal and economic fronts. Public and private-sector corruption is a fact of life in all parts of the world. While any political trustee must seek to reduce corruption as part of its effort to build a liberal democracy and to establish conditions for private markets to function effectively, it must not let fear of corruption hold back progress.

The U.S.-led political trustees in Iraq apparently have the balance about right. Blockages of political and economic development have resulted from security threats and political deadlock or uncertainty, but anti-corruption efforts are operating parallel with other initiatives. The Iraqi Business Center website contains a button on its top page for reporting corruption.<sup>165</sup> The instructions appropriately distinguish between concrete reports of solicitation of bribes or kickbacks, payment of bribes, or threats from competitors from rumors or complaints about unsuccessful bids.<sup>166</sup> Its scope is confined to corruption in the public tender process, and does not accommodate complaints of corruption in regulation of business or delivery of public services.

#### *E. Failure to Define a Coherent Exit Strategy*

*Political Trusteeship* argues that successful political trusteeship requires defining a coherent exit strategy that permits the trustee to leave before local resentment overwhelms its international legitimacy, but after the seeds of a liberal democracy have been planted so they are likely to grow after the trustee leaves.<sup>167</sup> Abandoning an absurd early myth that the occupation army would be uniformly embraced, the Bush Administration came to recognize by late October 2003 that it had no real exit strategy, and needed to develop one quickly.<sup>168</sup> Intolerance for the occupying forces was high and growing. The U.S. needed to find a way to turn over governmental power before legitimacy of the trustee broke down completely.

Working under this time pressure, the U.S. formulated reasonably coherent concepts for evolving the initial Interim Authority into a more

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165. Iraqi Business Center, at <http://iraqibusinesscenter.org/> (last visited July 8, 2004).

166. Political Trusteeship, *supra* note 1, at 467.

167. Michale Hirsh, *Racing the Clock in Iraq*, NEWSWEEK, Feb. 9, 2004, at 32, 35. (noting that Bremer had to retreat from earlier plan and agree to earlier transfer of sovereignty).

168. JABAR, *supra* note 104, at 10—11. (reporting concerns of and opposition by Shiite constituencies).



effective and more representative Iraqi interim government, and explored a variety of ways in which to improve representation, while at the same time deferring popular elections until more progress had been made on erecting mediating institutions. Failure to deal effectively with Shiite ambitions for a share of power commensurate with Shiite numbers made the reformulated U.S. plan dead-on-arrival.<sup>169</sup>

The outlines of an exit strategy for political trusteeship in Iraq are difficult to bring into focus because the course of local development is so difficult to predict. While it is relatively easy to define various scenarios for U.S. withdrawal, most of the obvious scenarios are deeply unsatisfactory and would represent a failure of the intervention. For example, goaded by Presidential election campaign politics, the Bush Administration may have moved prematurely to turn over power to a shaky Interim Iraqi Government in June 2004.<sup>170</sup> Political conditions in Iraq are such that American withdrawal likely would be followed by chaos or by establishment of a militant, anti-American Islamic regime, influenced by Iran or by al Qaeda. It is far from clear what other scenarios could produce both liberal democracy and an early American exit.

*1. Expect Post-Conflict Euphoria to Turn into Resentment of the Trustee*

Political trustees, like any occupying force, become unpopular. If a trustee has built substantial stores of internal legitimacy, it may enjoy a longer period of popularity. Eventually, the trust people will resent any power retained in trustee hands and insist that the trustee turn over all remaining power to locally accountable institutions.

This happened much sooner in Iraq than in other recent political trusteeships. President Bush responded directly to the pressure for the U.S. to leave Iraq when he modified the timetable for the CPA in late October 2003.<sup>171</sup> The early resentment of the U.S. occupation came as a surprise to the Administration but could have been predicted by the poor performance of the occupation in terms of almost all of the indicia of internal legitimacy.

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169. See Will Dunham, *Americans Squirm at U.S. Death Toll in Iraq Surges*, Apr. 20, 2004, at [http://www.veteransforpeace.org/Americans\\_squirm\\_042003.htm](http://www.veteransforpeace.org/Americans_squirm_042003.htm) (last visited July 8, 2004). (noting that Bush administration may choose to escalate or it may choose to declare 'victory' and go home).

170. JABAR, *supra* note 104, at 11—12. (reporting shift in timetable under White House political pressure).

171. *Id.* at 3—5. (describing uncertainty and shifting policies of Garner and Bremer).

## 2. *Clearly Define Triggers for Devolution to Local Institutions*

The ultimate challenge for any political trustee is to implement a coherent program of phased withdrawal, linking each major phase to achievement of explicit benchmarks tied to establishment of a liberal democracy. Premature withdrawal results in failure because conditions in the trust territory will revert to a state of affairs as bad as, or worse than, those that justified the international intervention in the first place. Deferring withdrawal too long will result in a progressive loss of control by the political trustee as local opposition grows, eventually accompanied by violence.

Since the United States never clearly defined the mandate or structure of its political trusteeship in Iraq and failed to meet the criteria for internal legitimacy, it has had difficulty in articulating a consistent, clear exit strategy. During the war, it was not clear what the U.S. intended after Saddam Hussein was deposed: a U.S.-run trusteeship? U.N.-led civilian administration? Immediate handover to Iraqi exiles? After President Bush declared the military phase of the occupation over, reconstruction administrator Jay Garner sought rapid delegation of civil authority to exiles, accompanied by immediate elections.<sup>172</sup> After the Administration displaced Garner with J. Paul Bremer, Bremer reversed course and announced a more deliberate process of transferring power, with elections and constitution-writing coming earlier.<sup>173</sup> Then, in October 2003 the Administration scrapped that plan, and declared that power would be transferred to a transitional government selected through a vaguely defined community-based political process. The thought is that local leaders would be identified and acquire legitimacy spontaneously.<sup>174</sup> Within a month, it was clear that the plan was unworkable, and the Administration struggled to come up with another.

Unless the U.S. pursues the irresponsible course of withdrawing unilaterally from Iraq, regardless of progress toward constructing a stable local government with the institutions that could lead to a liberal democracy, it should have defined clear and practicable benchmarks for devolving power to local institutions. For such benchmarks to work, they must be developed in consultation with major Iraqi political interests. For its trusteeship to be successful, the U.S. must have the political discipline to stick with its benchmarks, regardless of the temptation to withdraw. Premature withdrawal will mark the

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172. JABAR, *supra* note 104, at 3—5.

173. *Id.*

174. *See supra* note 83 and accompanying text.

intervention and the political trusteeship as dramatic failures. The success of the Interim Government, to which sovereignty was transferred without conditions on June 28, 2004, will determine whether the handover on that date was premature.

### III. IMPACT ON U.S. FOREIGN POLICY

Two distinct questions exist about the impact of the Iraq invasion on American foreign policy. First, what is the impact of the new national security strategy exemplified by the Iraq invasion, assuming that the result of the invasion is to encourage the United States to pursue the strategy? Second, what effect will it have if America "fails" in Iraq, undercutting the credibility of its commitment to the strategy?

Assessing the impact of the Iraq war on American foreign policy requires articulating some basic tenets of U.S. policy with respect to which impact can be judged. Such tenets should be framed so as not to make the assessment tautological; the set of foreign policy tenets should be broad enough to encompass two basic scenarios comfortably. The first assumes that recently-reelected George Bush continues to pursue the Bush Doctrine. The assessment would ask what the Iraq experience portends with respect to the pursuit of the Bush Doctrine. The second scenario assumes that the Democrats return to power in 2008, and articulate fundamental changes in foreign policy. The assessment would ask how the Iraq experience will shape and constrain that significantly different foreign policy direction.

The following sections present basic tenets of U. S. foreign policy, explain the logic that led to adoption of the Bush Doctrine and the decision to invade Iraq. These sections argue that the Iraqi invasion undercuts U.S. foreign policy objectives because: the U.S.-led invasion failed to harness international legitimacy and failed to achieve internal legitimacy. The absence of legitimacy shows every sign of frustrating the goal of developing stable democratic institutions before the U.S. is forced into a premature exit. At best the Iraq intervention reveals the serious shortcomings of a U.S. foreign policy premised on unilateralism and overemphasizes use of military power focused on states. At worst, the Iraq intervention will undercut the credibility of the U.S. to project its power in support of its national interests particularly to reduce the threat of terrorism.

This part concludes with two sections, one arguing that any alternative to the Bush Doctrine must have the potential to attract at least as much mass public support. The second section suggests that part of any alternative should embrace the opportunity to use a

redesigned Peace Corps to extend American inspiration, even as the Iraq intervention plays itself out.

*A. Tenets of U.S. foreign policy*

*1. Goals*

At a sufficiently high level of abstraction, broad agreement exists across the ideological spectrum and through time on three basic goals for U. S. foreign policy:

*Keep America secure.* Every foreign policy maker and national security strategist agrees that one of the goals of U.S. foreign policy is to keep America secure from foreign attack on its territory and against its citizens and assets abroad.<sup>175</sup>

*Keep America prosperous.* U.S. foreign policy consistently seeks to promote American prosperity by opening up new markets for American goods and services, protecting American private investment abroad, and ensuring access by U.S. firms to the factors of production, including foreign investment, foreign labor, and foreign raw materials.<sup>176</sup>

*Project the American vision.* Although some realist theorists in international relations disdain this goal, broad agreement exists that a goal of U.S. foreign policy is to transform the rest of the world, whether that means ending the slave trade 160 years ago, or more generally to promote human rights, and democracy in the 21<sup>st</sup> Century.<sup>177</sup>

*2. Means*

Agreement is narrower on the means that should be used to pursue U.S. foreign policy goals. Nevertheless there is agreement across the ideological spectrum on the basic tools available.

*Deterrence.* There is broad agreement that deterrence, in the form of a threat of nuclear retaliation for a nuclear attack or of overwhelming

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175. NSS document, *supra* note 47.

176. *Compare id.* at 1–2 (“ignite a new era of global economic growth through free markets and free trade; expand the circle of development by opening societies and building the infrastructure of democracy”) with Samuel R. Berger, *A Foreign Policy for the Global Age*, 79 FOR. AFF. 22, 32 (2000). (“Economic integration advances both our interests and our values but also accentuates the need to alleviate economic disparities”).

177. *Compare* NSS document, *supra* note 47, at 1–2 (“champion aspirations for human dignity”) and NSS document at 1-2 (“Our goals on the path to progress are clear: political and economic freedom, peaceful relations with other states, and respect for human dignity”) with Berger, *supra* note 176, at 38. (arguing that the U.S. cannot protect its interests by diminishing its role in the world or by imposing its will).

conventional military response to direct attacks on American assets, plays an important role in defending the U.S. against physical attack. There is disagreement over the priority to be given deterrence in the future, with arguments over the degree to which deterrence can continue to be effective against rogue nations or non-state actors, and the degree to which the emphasis should shift from deterrence to prevention and interdiction.<sup>178</sup>

*Prevention/interdiction.* Historically, the United States has used military, intelligence and economic power to reach out and remove threats to its interests. Plots to assassinate Castro during the Kennedy administration, interventions in Viet Nam and elsewhere during the Cold War to prevent the “domino effect” from spreading Soviet and Chinese power, missile attacks on targets in Afghanistan and Sudan during the Clinton Administration were all examples. Much of the debate over the Bush Doctrine concerns the degree to which the United States should rely on this means of foreign policy, as well as the circumstances and scale of its use.<sup>179</sup>

*Cooperation.* A central characteristic of U.S. foreign policy after the Second World War was its pursuit of foreign policy goals through formal cooperation with other states. The United States led the effort to construct the United Nations, the World Trade Organization (“WTO”) and NATO, believing that it could realize its interests through a rule of international law, and that the cost—constraining its own power to act unilaterally—was worth paying. Much of the battle between the Bush Administration and its critics is fought over the degree to which the United States should continue to prefer such permanent international legal structures. There is agreement on the appropriateness of some

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178. The Bush Administration believed that deterrence was insufficient to forestall the possibility of use of weapons of mass destruction by Saddam Hussein and thus that it was necessary to remove him from power to remove the threat. *Compare* NSS document, *supra* note 47, at 1-2 (“transform America’s national security institutions to meet the challenges and opportunities of the twenty-first century”) *with* Berger, *supra* note 176, at 30. (“New dangers, accentuated by technological advances and the permeability of borders, require new national security priorities”).

179. *Compare* NSS document, *supra* note 47, at 1-2 (“transform America’s national security institutions to meet the challenges and opportunities of the twenty-first century”) *with* Berger at 30 (“New dangers, accentuated by technological advances and the permeability of borders, require new national security priorities”); *compare* NSS document, *supra* note 47, at 1-2 (“prevent our enemies from threatening us, our allies, and our friends, with weapons of mass destruction”) *with* Berger at 30 (“New dangers, accentuated by technological advances and the permeability of borders, require new national security priorities”); *compare* NSS document, *supra* note 47, at 1-2 (“work with others to defuse regional conflicts”) *with* Berger at 29 (“Local conflicts can have global consequences”).

form of cooperation.<sup>180</sup>

*Inducement/incentives.* U.S. economic power and diplomatic influence permit it to use a variety of “carrots” to encourage foreign states to change policies or behavior. Inducements include foreign aid, lifting of economic sanctions, granting of most-favored-nation status, military cooperation linkages, technical assistance in the political, legal and economic spheres, and channeling foreign investment.

*Inspiration.* The fact is, despite criticism of American cultural imperialism, that American culture is widely admired. For many around the world, the United States has served and continues to serve as a beacon of hope, with respect to human rights, economic success, rule of law, democracy, and opportunity for individuals. The rhetoric of American foreign policy, whether directed to American audiences or foreign audiences, often refers to the power of the American example to inspire mass publics and elites around the world.

*B. The Iraq invasion undercuts America’s ability to confront new realities in foreign affairs*

The Iraq invasion is a dramatic indication of U.S. willingness to pursue a new direction in foreign policy: the “Bush Doctrine.” The Bush Doctrine, responding to the perceived need for a coherent strategy and to concerns that significant instability in the world threatens to get worse without bold action, signifies a shift in preference from deterrence and multilateralism to military interdiction and unilateralism. The Doctrine uses inducements and incentives more aggressively and extends America’s inspirational capacity.

Unfortunately, the invasion and the Doctrine undercut America’s ability to accommodate new realities in the international relations system. The Doctrine fails to identify the real threats to American interests. It fails to recognize that international relations are no longer dominated exclusively by states. It avoids new geopolitical opportunities. It increases the likelihood of a “Clash of Civilizations.” It makes fundamental restructuring of America’s defense establishment less likely.

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180. Compare NSS document, *supra* note 47, at 1-2 (“strengthen alliances to defeat global terrorism and work to prevent attacks against us and our friends”) with Berger, *supra* note , at 25 (“America’s alliances with Europe and Asia remain the cornerstone of its national security, but they must be constantly adapted to meet emerging challenges”). Compare NSS document, *supra* note 47, at 1-2 (“develop agendas for cooperative action with other main centers of global power”) with Berger, *supra* note , at 27 (“Peace and security for the United States depend on building principled, constructive, clear-eyed relations with our former great-power adversaries”).

*1. The invasion symbolizes adherence to Bush Doctrine*

As the invasion of Iraq is best understood as the first effort to implement the Bush Doctrine, assessing the invasion of Iraq necessarily involves assessing the Bush Doctrine.

*(a) Emergence of the Bush Doctrine*

The end of the Cold War left the world without a structure of international relations. The first Bush Administration briefly flirted with the vague idea of a New World Order. The Clinton Administration pursued a policy of selective intervention with an emphasis on the development of civil society and human rights, as in Bosnia and Kosovo. The second Bush Administration came to office preaching disengagement, unilateral pursuit of U.S. interests, suspicion of multilateralism, preoccupation with threats from China and Russia and a determination to implement an unproven national missile defense system. After the attacks of September 11, 2001, in its "war on terrorism," the Bush Administration arranged a broad coalition of states to assist in responding to the attacks of September 11 through military intervention in Afghanistan. Then the Administration announced a new national security strategy, which emphasizes military preeminence, unilateral military action and questions the utility of treaties and other multilateral frameworks. The U.S.-led attack against Iraq for the purpose of deposing the Saddam Hussein regime is widely viewed as the first clear example of application of the "Bush Doctrine."

The determination to invade Iraq and the articulation of the Bush Doctrine resulted from political and policy making processes that were intertwined. The Iraq invasion was the culmination of a logical process. The September 11th attacks showed that international relations were spinning out of control. The institutions of international security, particularly the U.N. and NATO, demonstrated during the conflicts in Bosnia and Kosovo, but also to some extent in framing an international mandate for military action in Afghanistan after September 11, significant limitations of political will which (especially in Bosnia and almost in Kosovo) thwarted what the United States believed was appropriate and necessary action. In those cases, as in Afghanistan, the United States had the power to do what it thought was necessary, and it was held back by political constraints. In the case of Bosnia, the U.S. believed these restraints lost thousands of lives unnecessarily.

The U.S. did not fully understand the dynamics of the non-state aspects of terrorism, but it knew that states, including Afghanistan, Iran, Libya and perhaps Saudi Arabia, encouraged terrorist organizations

aimed at other states and provided significant material support to terrorist networks. It was likely that terrorist networks would represent ever greater threats as their technological capabilities increased, especially if they could have weapons of mass destruction at their disposal.

The Bush Administration, frustrated like its predecessors with lack of progress in the Middle East and worried about the implications of continuing the deadlock between Israel and the Palestinians indefinitely, was receptive to ideas for some kind of breakthrough. It began hearing from the Jewish Community in the United States that Iraq represented an “existential threat” to Israel and was a more important focus for the U.S.<sup>181</sup>

President Bush wanted a bold foreign policy initiative as a response to the attacks of September 11. The Republican foreign policy establishment had consistently criticized the Clinton Administration for failing to develop a coherent foreign and national-security policy strategy to follow the Cold War. The National Security Strategy was the strategic result of Bush’s push.

Major elements of the Bush Doctrine are expressed in the National Security Strategy, which reflects a stock of intellectual capital developed during the 1990s by the Republic foreign policy establishment. In 1996, William Kristol and Robert Kagan characterized conservatives as “adrift” in foreign policy.<sup>182</sup> They argued that a “neo-Reaganite foreign policy would be good for conservatives, good for America and good for the world.”<sup>183</sup> Such a foreign policy would be based on “benevolent hegemony,” and would comprise three elements: greatly increased defense expenditures aimed at preserving American hegemony as long as possible; greater involvement by citizens at large in the role of the military and in the national-security enterprise; and stronger moral leadership focused on certain American principles for governance abroad—democracy, free markets and respect for liberty.<sup>184</sup>

During the Presidential campaign of 2000, Condoleezza Rice, later to become National Security Adviser in the Bush Administration, argued for a “disciplined and consistent foreign policy that separates the

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181. When the author was a Congressional candidate beginning in late 2001, he heard this message from Jewish political action groups, when he courted their support.

182. William Kristol and Robert Kagan, *Toward a Neo-Reaganite Foreign Policy*, 75 FOREIGN AFF. 18 [hereinafter “Kristol & Kagan”].

183. *Id.* at 32.

184. *Id.* at 23—27.



important from the trivial.”<sup>185</sup> She urged rejection of the idea that American exercise of power is only legitimate when exercised on behalf of someone or something else (such as international law) and urged instead explicit pursuit of American self-interest.<sup>186</sup> Pursuit of American self-interest would focus policy on the priorities: ensuring American ability to project power through a strong military, promoting economic growth and political openness by extending free trade and a stable international monetary system, seeking strong relationships with allies, developing relationships with Russia and China to mold the international political system and dealing with the threat of rogue regimes which fuel the potential for terrorism and the spread of weapons of mass destruction.<sup>187</sup>

The core ideas of the Bush Doctrine have been described as a short shrift for NATO and the U.N., dismissal of treaties as non-binding, and “brazen” protectionism.<sup>188</sup> This new “grand strategy” envisions an America “less bound to its partners and to global rules and institutions, while it steps forward to play a more unilateral and anticipatory role in attacking terrorist threats and confronting rogue states seeking weapons of mass destruction.”<sup>189</sup>

*(b) The decision to attack Iraq*

The Bush Administration, like the Clinton Administration, perceived that any international strategy would mean little unless the American people would show support. The Bush Administration needed a way to crystallize the new National Security Strategy in concrete action, without which the Strategy might become an empty pronouncement. Politics is the art of the possible and the science of

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185. Condoleezza Rice, *Campaign 2000: Promoting the National Interest*, 79 FOREIGN AFF. 45-46 [hereinafter “Rice”].

186. *Id.* at 47.

187. *Id.* at 46-47.

188. Michael Hirsh, *Bush and the World*, 81 FOREIGN AFF. 18, 20 (1996) [hereinafter Hirsh]; *id.* at 22 (reporting on convergence between realist internationalists such as Rumsfeld and Cheney and neoconservatives led by Wolfowitz, which leaves moderate unilateralists such as Powell and Haas lonely).

189. G. John Ikenberry, *America's Imperial Ambition*, 81 FOREIGN AFF. 44, 49; *id.* at 49-55. According to Ikenberry, the Bush strategy comprises seven elements: (1) commitment to maintain unipolar world, (2) assessment of terrorism threat as immune from appeasement or deterrence, (3) dismissal of deterrence as outdated and anticipatory use of force necessary, (4) devaluing of sovereignty to permit U.S. to use force across borders, (5) depreciation of international rules, treaties and security partnerships, (6) unconstrained and direct role for U.S. in responding to threats, and (7) backing away from international stability as a goal. *Id.* at 49-55.

timing. The September 11th attacks satisfied the “scientific” timing element for a bold move, leaving the question of what sort of move was “possible.” What kind of bold assertion of U.S. power after the military success in Afghanistan could receive public support in the U.S., while otherwise satisfying U.S. goals?

A number of candidates, otherwise qualified because of their support for international terrorism, could be ruled out as impracticable. Saudi Arabia was perceived as the staunchest U.S. ally in the region, although most of the September 11 hijackers were Saudis and overwhelming evidence existed demonstrating that Saudi elements were the most important sponsors of al Qaeda, other terrorist networks and of fundamentalist Islam. Moreover, a move against the Saudis would threaten important oil resources on which the U.S. and its allies depend. Iran was a tempting target, but is strong militarily. Libya had long been a sponsor of terrorism and an international pariah, but Mumar Quadaffi had not done anything recently to arouse public opinion against him. North Korea was a candidate for some kind of aggressive action because it could preempt rapidly developing nuclear capability. However, North Korea had little connection with terrorism or the Middle East, and military action against North Korea could have provoked Chinese response against Taiwan or other action.

Pakistan might have been a strong candidate because of its historic support for radical Islam in Afghanistan and elsewhere, but Pakistan was a strong and essential supporter of U.S. action in Afghanistan. A move against Pakistan would have been a case of biting the hand that feeds you.

The process of elimination left the Iraqi regime of Saddam Hussein. Iraq had thumbed its nose at the U.N., supporting the inference that it was determined to develop weapons of mass destruction. The international community was in a state of ongoing military conflict to enforce the no-fly zones. Iraq, though ruled by a secular government, was largely Muslim in population. It was linked with the Middle East. Although there were few connections between the Iraqi regime and al Qaeda, Saddam was known to provide support to local terror networks in Palestine and Israel. This left Iraq as the only plausible target for further bold action. The challenge then was to rally public support in the U.S. and internationally. The context, provided by the new National Security Strategy made the former much more important than the latter.

The Bush Administration’s Iraq initiative brings two inspirational activities to the forefront of American foreign policy, activities that were also embraced by the Clinton Administration; spreading

democracy as a goal of foreign policy and nationbuilding. Both were and are anathema to the realist and neorealist ideologies that dominated much of the pre-Iraq debate. While embracing these goals could represent common ground among adherents and critics of the Bush Doctrine, the way the Bush Administration embraces these goals diminishes the likelihood of consensus.

## *2. The invasion avoids the real threats to American Interests*

The threats to America's interests in the twenty-first century are fundamentally different from those in the twentieth. In the twentieth century, threats arose from essentially state-based extension of power over geography. Although geopolitical factors have not disappeared from the international equation, most twenty-first century threats arise from failure of states to channel and contain the forces of reaction to modernity, including globalization. This failure results in terrorism and failed states. The principal effects of the U.S.-led attack on Iraq will prove to be acceleration of the spread of weapons of mass destruction, intensification of the terrorism threat, greater difficulty in persuading other states to join with the United States in initiatives that promote mutual interest—as perceived by U.S. leadership—and diminished credibility for the efficacy of military power.

The invasion of Iraq as the first project of the Bush Doctrine undercuts development of constructive attitudes in the American electorate about how international relations works and how U.S. foreign policy can best keep America secure and prosperous while promoting democracy and human rights in the rest of the world. Repeated rhetorical reference to “war” and “wartime,” accompanied by heavy-handed response to criticism, reinforces domestic disdain for serious long-term democracy development efforts. It beats ploughshares into swords in the minds of the American public. Even as President Bush uses his “bully pulpit” to narrow the view of the American public and to diminish their understanding of the hard realities of international relations and national security, the Bush Doctrine is making it more difficult to embrace international opportunities.

### *(a) The invasion of Iraq is based on a fundamental misunderstanding of the genesis of terrorism*

Protecting America against terrorist attacks on our territory or on the territory of our allies cannot succeed without accepting the fact that terrorism arises from failures to deal with reactions to modernity and globalization. American foreign policy cannot succeed without a

strategy aimed at overcoming the failures and, in the meantime, blunting the forces of reaction. The U.S.-led attack on Iraq, despite being presented as related to the campaign against terrorism, has seriously distracted the U.S. from an effective initiative to reduce the terrorist threat.<sup>190</sup> It also misleads the public as to what a campaign against terrorism entails.

The Iraq war will intensify terrorism. The phenomenon of terrorism is closely associated with successful recruitment of young people whose humiliation can be turned into the kind of rage that produces a continuing supply of suicide bombers. Such recruitment is made easier by American conduct that easily can be characterized as disdainful of values held by other societies and pessimism that nothing other than violence can discourage American intrusion. When American power is focused on ideologies such as Islam, the recruitment process is made easier.

Societies where education is available with limited opportunities are breeding grounds for extremism. Creating opportunities for participation in public life and economic activity will enhance political stability and reduce the allure of religious extremism for future generations. Such opportunities arise only when progress is made toward rule of law, civil society and market competition. The same kinds of institutions necessary for a liberal democracy: courts and judiciaries, independent political parties, judges and bar associations, analogs of parent-teacher associations, leagues of women voters, veterans of foreign wars, rotary clubs, alumni associations appropriate for local cultures, ministries of culture and education, trade promotion agencies, chambers of commerce, trade associations and trade unions all provide pathways of participation for those with ambition.<sup>191</sup>

Demonizing Islam and pronouncing a "War on Terrorism" are unresponsive to these realities. Moreover, the U.S. must recognize that its public diagnosis of the terrorism threat differs fundamentally from its European allies. The metaphor of a "War" on terrorism suggests that conventional, predominantly military, responses will be effective. The European perception is that terrorism is a polycentric phenomenon,

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190. Joseph S. Nye, Jr., *U.S. Power and Strategy after Iraq*, 82 FOREIGN AFF. 60, 72-73 ("metaphor of war should not blind Americans to the fact that suppressing terrorism will take years of patient, unspectacular civilian cooperation with other countries in areas such as intelligence sharing, police work, tracing financial flows, and border controls;" all the precision bombing in Afghanistan destroyed only a small fraction of Al-Qaeda's network, which retained cells in some 60 countries; bombing cannot resolve the problem of cells in Hamburg or Detroit).

191. See generally *supra* Part II.D.

paradigmatically illustrating the ascendancy of non-state based forces in the 21<sup>st</sup> century. As such, it must be met with fundamentally different approaches from those historically used to counter or preempt state-based threats.

*(b) The Iraq invasion encourages other states to arm or ally against America*

Historically, states have been uncomfortable when another state is so powerful that they must acquiesce in its foreign policy. When this occurs, weaker states tend to adopt foreign policies to contain the power of stronger states. In the 21<sup>st</sup> century, this can take the form of acquiring weapons of mass destruction to deter the stronger state from actions antagonistic to the interests of weaker states. It can also take the form of alliances against the stronger state. There is no reason to suppose that this tendency has disappeared. Accordingly, one measure of success in U.S. foreign policy is reduced incentives for other states to arm or ally against America.

The Iraq adventure represents a dramatic move in the wrong direction. It will encourage the spread of weapons of mass destruction to rogue states and will encourage development of alliances aimed at countering American power.

*(1) The Iraq invasion will intensify the spread of weapons of mass destruction*

Leaders of foreign states, especially those opposing U.S. policies, will worry about unrestrained application of U.S. military power. The war in Iraq teaches that the United States will be willing to attack another state for the purpose of deposing its leadership, even when most of the rest of the world opposes the enterprise. The crucial foreign policy question for those leaders will be how to deter U.S. action against their government. A further lesson from the Iraq war is that a foreign state has little hope of prevailing through reliance on conventional military force. The only effective approaches to deterrence are weapons of mass destruction, as North Korea has learned, or sponsorship of terrorism.

*(2) The Iraq invasion will encourage Europe to form another geopolitical pole*

American interests are served better by a cooperative relationship with Europe than by an antagonistic one, especially if European antagonism manifests itself in hostile trade policies or in development

of an independent military capability. As political integration in Europe proceeds, possibilities will increase for an independent European foreign policy. European history and tradition, reinforced by resentment about the rough rhetoric used by the Bush Administration in the run-up to the invasion of Iraq, increases the risk that Europe will seek ways to counterbalance U.S. power.<sup>192</sup>

Charles Kupchan offers a useful comparative analysis of the major scenarios articulated by commentators and scholars on the future of international relations.<sup>193</sup> Kupchan disagrees with many of them and suggests that a unipolar world dominated by the United States is both stable and beneficial. He suggests, “unipolarity is here, but it will not last long.”<sup>194</sup> The near-term challenger to the United States is, in his view, not a single country trying to play catch-up but a “European Union that is in the process of aggregating the impressive economic resources that its member nations already possess.”<sup>195</sup>

Kupchan believes that a culmination of unilateralism and isolationism will leave the United States alone as it seeks to pursue its interests.<sup>196</sup> He expects a multi-polar World, with the United States being one pole, and Europe and East Asia the other two.<sup>197</sup> He argues that integration of Europe will continue and that its growing assertiveness will split an essentially unipolar Atlantic alliance into two new poles, much as the Roman Empire split into the Eastern Empire and the Western Empire.<sup>198</sup> “For now . . . it is Europe that is emerging as America’s only major competitor.”<sup>199</sup>

Sharp disagreements over the invasion of Iraq between the United States on the one hand, and Germany and France on the other, obviously represent a flashpoint in U.S.-European relations. Mocking of the “Old Europe” by Defense Secretary Rumsfeld, and a de-emphasis of the role

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192. See generally CHARLES A. KUPCHAN, *THE END OF THE AMERICAN ERA* (2002).

193. *Id.* at 46—50.

194. *Id.* at 61—63. Two trends suggest to him that American dominance will not last more than a decade. The first trend is a diffusion of power, and the second trend is a changing view of internationalism in the United States bowl. “Unipolarity rests on the existence of a polity that not only enjoys preponderance, but also is prepared to extend its dominant resources to keep everyone in line and to underwrite international order. If the United States were to tire of being the global protector of last resort, unipolarity still would come undone even if American resources were to remain supreme. KUPCHAN, *supra* note 192, at 61—63

195. *Id.* at 62.

196. *Id.* at 67.

197. *Id.* at 67—68.

198. *Id.* at 119—120.

199. KUPCHAN, *supra* note 166, at 159.

of NATO and of multilateral structures in general in the National Security Strategy will almost certainly make matters worse, and encourage development of a European foreign policy antagonistic to U.S. interests.

*(3) The Iraq invasion and other aspects of the Bush Doctrine will encourage Japan to form another pole*

Japan has been one of America's most dependable allies in the post-War era. Confident that the U.S. would protect it against China and other regional threats, Japan was content to maintain a low military profile and to pursue prosperity through international trade under a Pax Americana. U.S. preoccupation with Iraq and with the campaign against terrorism show signs of distracting it from broader strategic issues in Asia. The failure by the United States to manage relations with China effectively and the lack of engagement in dealing with North Korea's nuclear threat could encourage Japan over the long run to re-arm and to pursue an independent foreign policy. Charles Kupchan suggests the possibility of a convergence between Japan and China, which could represent a third geo-political pole, alongside Europe and the United States.<sup>200</sup>

*3. The invasion ignores the reality that that international relations now involves more than sovereign states*

Historically, foreign policy proceeded from two assumptions: military capability must aim at opposing and defeating armies directed by states; and diplomacy is defined by relations among states—the “billiard ball” theory of international relations. Now states are only one of several types of international actors. The central conceptual challenge of the war on terrorism is dealing with this reality. Winning the campaign against al Qaeda is not at all the same as driving Iraq from Kuwait or deterring a nuclear attack by the Soviet Union. A central flaw in the Bush Doctrine is that it proceeds from a “billiard ball” theory of international relations.

In this century, political power has been diffused above and below the state level. States cede a measure of sovereignty upward in a complex framework of inter-governmental organizations, such as the World Trade Organization and the institutions of the European Union. They also exercise power constrained by the diffusion of political power into sub-state private groups, such as NGOs and militant organizations,

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200. KUPCHAN, *supra* note 166, at 278—81.

including the Kosovo Liberation Army, al Qaeda, Hamas, and Hezbollah.<sup>201</sup> New information technologies, including the Internet, open up new channels for political interaction, both domestically and across national boundaries. At the same time, other technological advances place powerful new weapons—anti-aircraft missiles and biological weapons—into the hands of individuals and groups. An effective U.S. foreign policy must deal with this reality instead of pretending that the much-easier task of playing diplomatic chess with a limited number of state actors is sufficient.<sup>202</sup> Disturbing signs exist that the Bush Doctrine and the invasion of Iraq turn back toward treating the world as a billiard table. If one accepts the neo-realist theory of international relations, then the Iraq invasion may look like good foreign policy because it alters the balance of state-based power in the Middle East.

Realists such as John Mearshimer and Charles Kupchan treat international relations as interactions among impermeable states—“billiard balls.” Though they reach different conclusions about its effects, Mearshimer predicts fragmentation into a multipolar system, in which stability is assured only by a limited proliferation of nuclear weapons. Kupchan predicts an end to U.S. dominance, with the U.S. opposed by Europe, and possibly by a China-Japan axis.

The problem with realist theories is that they treat states as inanimate, influenced by interstate forces, much as physics views atomic elements, influenced by electrical fields and intra-atomic forces. Their theories give short shrift to leadership, good and bad, and to the uncertainties of political conflict within states. They suggest that states will behave in certain ways in response to changes in the balance of power, but they do not explain why. Another popular commentator, Thomas Friedman suggests why these realist theories are incomplete: states respond to popular opinion, which in turn is influenced by global

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201. See William O. Beeman, *A Formidable Muslim Bloc Emerges*, LOS ANGELES TIMES, May, 27, 2003, at B13 (“The U.S. is used to thinking of the world in terms of individual nation-states. But the Shiites are a transnational force. The U.S. has unwittingly supplied the key linkage for this bloc by destroying the secular government of Saddam Hussein. That brought that country’s Shiite majority to the fore, creating a solid line of Shiite-dominated nations from the Persian Gulf to the Mediterranean Sea.”).

202. See Nye, *supra* note 164, at 72-73 (power is “widely distributed and chaotically organized” among state and non state actors; United States cannot obtain outcomes it wants without agreement of European Union, Japan, and others; “by devaluing soft power and institutions, the new unilateralist coalition of Jacksonians and Neo-Wilsonians is depriving Washington of some of its most important instruments for the implementation of the new national security strategy.”).



as well as intra-state forces.<sup>203</sup>

The Iraq invasion looks very different if one rejects the “billiard-ball” theory of international relations. The invasion will make it harder for the U.S. to persuade other nations to join forces. “Because the world gets only marching orders from Bush and not a common vision, it will be less inclined to follow them.”<sup>204</sup> In the short run, some former adversaries are willing to help rebuild relations.

*(a) Foreign popular opinion, shaped by democratic politics, matters*

U.S. foreign policy needs to concern itself with popular opinion both at home and abroad. In other words, it needs to accept the insights of scholars associated with the “domestic politics” branch of liberal international relations theory, and to recognize the incompleteness of neo-realism in international relations theory.<sup>205</sup>

Realist international relations theory obscures the importance of foreign public opinion in international relations because it treats states as impermeable, represented by leaders who accurately perceive state interests and act rationally in pursuit of those interests.<sup>206</sup> No foreign policy or national security strategy can be effective if it only focuses on the actions of states. International legitimacy is built or undermined nowadays, not only by arguments made by diplomats and chiefs of government to their counterparts around the world; it is also shaped by public perceptions of human suffering and injustice. In fact, foreign leaders, especially in democratic political systems, act like American politicians. Foreign policy issues are part of an overall matrix of political calculation. If it is unpopular in their country to support American positions, leaders of other countries are more likely to oppose American positions. This is why popular legitimacy is so important, and why an American foreign policy that looks arrogant and unconcerned with the interests and welfare of other parts of the world is so damaging.

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203. Thomas L. Friedman, *Restoring Our Honor*, N.Y. TIMES, May 6, 2004, at A35. (arguing that America’s moral authority matters because mass opinion matters in international relations)

204. Hirsh, *supra* note 162, at 28.

205. “In its modern iteration, liberal international relations theory has come to stand for the straightforward proposition that domestic politics matter.” Oona A Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935, 1952 (2002).

206. This is the “billiard ball” metaphor. See William C. Bradford, *International Legal Regimes and the Incidence of Interstate War in the Twentieth Century: A cursory Quantitative Assessment of the Associative Relationship*, 16 AM. U. INT’L L. REV. 647, 665 n. 57 (2001). (stating that realists embrace “‘billiard ball’ model of the international system, in which states are regarded as identical in form and function and opaque with regard to domestic regime type and state society relations”).

This is hardly a new idea. Any experienced negotiator knows that negotiators often defend their positions and their refusals to acquiesce to opposing positions based on their perception of constituent pressures.<sup>207</sup> Foreign policy theory must be connected to the reality of international negotiations, and that reality includes the growing impact of public opinion in a world increasingly democratic and transparent.

American policy must treat international politics as politics. Decision makers in foreign states behave like decision makers in the United States. If they function in a democratic political system, they are constantly asking themselves, "what will I run on; what will resonate with the voting public?" When American diplomats want to gain support from other states, they must put themselves in the position of the popularly elected decision makers in the foreign states and ask themselves the same questions. The necessity of this kind of projected political analysis means that American foreign policy must be conditioned in substantial measure by the impact of perceived American positions on foreign public opinion. When the President of the United States is greeted by mass demonstrations in opposition to American policy in England, it matters.<sup>208</sup> When opinion surveys say that 90 percent of the Spanish population is opposed to Spain's involvement in Iraq, it matters. When the candidate for reelection as Chancellor of Germany runs on a platform of opposition to American foreign policy regarding Iraq and America's campaign against terror, it matters.

In the dynamics of internal politics, Diaspora opinion counts. In the United States, the Jewish Diaspora has enormous influence in American politics, as do the Irish and the Polish. The same thing is true in other countries. The history of the breakup of Yugoslavia indicates that the Croatian Diaspora in Germany had considerable influence on the decision of the German government to break ranks with the rest of Europe and to insist on the recognition of Slovenia and Croatia after they seceded from Yugoslavia. As Islamic populations in Europe grow

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207. See, e.g. Keith Bradsher & Joseph Kahn, *Running for Re-election, Taiwan Leader Takes on China*, N.Y. TIMES, Dec. 6, 2003 at page A7 (explaining how re-election position of Taiwan President seeking referendum on Chinese missile threat to Taiwan is destabilizing relations between China and Taiwan); James Bennet, *An Ally of Sharon Foresees a Palestinian State*, N.Y. TIMES, Dec. 6, 2003, at page A6 (suggesting that position by senior leader of Likud Party is intended "to build support on the right" for action to break Middle-East negotiation stalemate). Whether these political positions predominate in the domestic politics of Taiwan and Israel will affect foreign relations of those states. One cannot assume that Israel or Taiwan will take a position determined objectively by realist international relations theory.

208. In undemocratic political systems the question may take the form of "What will resonate with the army—or other groups that keep me in power?"

the ability of the United States to gain support from European states depends upon the United States' ability to shake its reputation for leading a campaign against Muslim countries and Islam.

This article does not argue for a "Wilsonian" approach to international relations. A crucial difference exists between Woodrow Wilson's approach to the world and a desirable American approach to the world in the twenty first century. Woodrow Wilson tended to over-emphasize the impact of appropriate institutional arrangements on political behavior. He embraced public administration more than politics. What America needs is not so much a Wilsonian approach, as Wilson himself conceived it, but the approach of a political scientist and a practical politician.<sup>209</sup> The United States needs foreign policy makers who think about international politics and international relations from the same perspective that would be astute in thinking about domestic American politics. An effective American foreign policy would not look upon foreign leaders as completely autonomous decision-makers who can respond to American entreaties, or threats or inducements entirely on their own; it should instead look upon them as practical politicians, constrained by what they think their publics will accept in the long run. American foreign policy thus refocuses on what is necessary to shape popular opinion in foreign countries.

This is a better perspective for understanding and shaping the behavior even of autocrats in non-democratic states. Any political leader who survives for long recognizes that there are limits on coercion as a means of maintaining power. At some point, the gap between decisions by a government and popular opinion may grow so wide that the result is revolution. Leaders of foreign states are likely to remember the example of the Shah of Iran, who was deposed despite overwhelming U.S. support simply because public opinion decided not to tolerate him further.<sup>210</sup>

Public opinion matters not just in the United States, but in other states, which are increasingly democratic. By declaring that only U.S. interest matters in U.S. foreign policy, the United States forgoes its moral leadership, which makes it harder to convince foreign publics that

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209. See Anne Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240 (2000) (embracing view of "international political system as some political scientists see it—from the bottom-up rather than the top down . . .") [hereinafter Slaughter, *Liberal Theory*].

210. See Jeffrey Usman, *The Evolution of Iranian Islamism from the Revolution Through the Contemporary Reformers*, 35 VAND. J. TRANSNAT'L L. 1679, 1704—05, n. 154 (2002). (characterizing Islamic revolution in Iran as reaction to U.S. "conspiracy" with Shah to modernize Iranian society).

their leaders should support U.S. policy because it is good for them or good for the international system. If America has declared that it turns its back on others' interests and on international legal and political structures, few will believe that it is in their interest to support American initiatives. Those ambitious for political power are more likely to find domestic political resonance in a message that is anti-American. There will be less domestic political risk in being at odds with America at the negotiating table, whether the issue is trade, stability in the Balkans, preserving the North Atlantic Alliance or disarming North Korea or Iran.

*(b) International Law and Other Formal Multistate Structures Matter*

Rhetoric seeking to shape public opinion depends importantly – though not exclusively – on reference to international law.<sup>211</sup> In 1997, Richard Haas wrote a book entitled *The Reluctant Sheriff*.<sup>212</sup> The title signifies that the United States (the sheriff) finds itself in the position of having to build coalitions (the posse) in order to overcome threats to world peace and security. While the United States is the preeminent military power, it needs participation by other states to act effectively.

Writing later, in 1999, Haas continues by arguing that “an effort to assert or expand U.S. hegemony will fail.”<sup>213</sup> The proper goal for American foreign policy, in his view, was to “encourage a multipolarity characterized by cooperation and concern rather than competition and

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211. “The Holy Grail of politically-oriented international law scholars has been to reconnect our discipline with the study of political science and international relations, a connection lost since at least the 1950s. Some prominent international relations scholars flatly rejected law as anything worth considering, while political scientists generally became mired in methodological thickets as irrelevant as the old positivist scholarship. In the past decade, however, the disciplines have been fruitfully reunited. Anne-Marie Slaughter and Ken Abbott proposed agendas, and several scholars have used the two disciplines to elucidate particular areas of law. Most impressively, Michael Byers has studied power and customary international law using a sophisticated understanding of realism, regime theory, and traditional international law scholarship to show ways in which law makes a difference in state behavior.” Phillip R. Trimble, *The Plight of Academic International Law*, 1 CHI. J. INT’L L. 117, 122-123 (2000) citing Harold Hongju Koh, *Review Essay, Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997); Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INTL L. 205 (1993); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INTL L. 335 (1989); Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INTL L. 367 (1998).

212. Haas subsequently was Director of Policy Planning in the Bush State Department and then President of the Council on Foreign Relations.

213. Richard N. Haas, *What to Do With American Primacy*, 78 FOREIGN AFF. 37, 38 (1999).

conflict.”<sup>214</sup> A policy aimed at pursuit of this goal would comprise four elements: less reliance on military force to resolve disputes, “reducing the number of weapons of mass destruction,” accepting a limited doctrine of humanitarian intervention, “based on a recognition that people—and not just states—enjoy rights,” and opening markets to economic competition.<sup>215</sup> The economic goal would encourage free movement of the factors of production across international lines and transparent domestic markets favoring private initiative.<sup>216</sup>

My 1998 review of Haas’ book embraced the sheriff and posse metaphors, while arguing that the metaphors necessitate attention to the role of international law and multilateral institutions.<sup>217</sup> The sheriff in the Old West had to persuade the public. A posse, whether or not organized by the sheriff, was a lynch mob unless a court-issued writ authorized its formation and activity. Similarly, international law plays a major role in legitimizing the modern form of an international posse.

International law comprises not only norms but also institutions for coordinating action, for modifying norms and for resolving disputes. Acting through these institutions reduces transaction costs and enhances popular support because it appears law abiding. “Every major international institution. . . was made in America. And taken together, all this institution building has amounted to a workable international system, one in which democracy and free markets seem to be an ever-rising tide.”<sup>218</sup> The human rights movement lies at the core of the transformation of international law from a regime that focused entirely on the relationships among states into a regime that focuses on the relationship between states and natural persons. American prosperity has come to depend on continued functioning of the international system. U.S. corporations now operate through transnational integrated production systems that depend on hospitable policies in foreign states and accepting attitudes by NGOs.<sup>219</sup> “The U.S. economy, meanwhile, had become addicted to the Wall Street-centered international financial system. America had become a new user of other nations’ capital, enabling Americans to habitually buy more goods from abroad than

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214. *Id.*

215. *Id.* at 39.

216. *Id.* at 41.

217. See Henry H. Perritt, Jr., *Richard Haas, The Reluctant Sheriff: The United States after the Cold War*, 26 SYRACUSE J. INT’L L. & COM. 95 (1998) (book review).

218. Hirsh, *supra* note 162, at 31.

219. *Id.* at 32.

they sell to others.”<sup>220</sup>

The Bush Doctrine is startling for its abandonment of a commitment to a rule of law in international affairs and its disdain for multilateral frameworks. The chapter of the National Security Strategy document entitled “Cooperation” makes almost no mention of the United Nations, of NATO or of the WTO or of other treaty frameworks.

The “new imperialism” of the Bush strategy is associated with several risks.<sup>221</sup> Neo-imperialist approaches are likely to prove unsustainable. American unilateralism will diminish the willingness of other states to participate in multilateral efforts to monitor and enforce non-proliferation commitments, which will leave the part of the Bush strategy focused on weapons of mass destruction “blind and deaf.”<sup>222</sup> The use of force to eliminate regimes seeking to acquire weapons of mass destruction or to support terrorism must be followed by extended nationbuilding activities to “put the target country . . . back together,” and this is likely to require greater resources than the American people are prepared to commit.<sup>223</sup> Unilateralism is unlikely to generate multilateral cooperation in the areas of “intelligence, law enforcement and logistics.”<sup>224</sup> Foreign states, unable to oppose the U.S. militarily will fall back on the only non-violent weapon they have: lack of cooperation.<sup>225</sup> American arrogance, in the long run, is likely to generate “self-encirclement”—alliances aimed at containing the United States.<sup>226</sup>

The United States should reaffirm its commitment to multilateral institutions, beginning with the U.N. The U.S. should resume the efforts begun during the Clinton Administration under the leadership of Madeleine Albright and Richard Holbrook, to strengthen the governments’ ability to deal with new problems of terrorism and the construction of civil society. The United Nations is a symbol of the potential of multilateral cooperation. Despite its deficiencies, the U.N. has made progress under the leadership of Secretary General Kofi Annan and Ambassador Richard Holbrooke, who worked to bridge differences between the organization and the American right,

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220. *Id.*

221. See Eliot A. Cohen, *History and the Hyperpower*, 83 FOR. AFF. 49 (2004). (evaluating Bush foreign policy as imperialist); Joseph S. Nye, Jr., *U.S. Power and Strategy after Iraq*, 82 FOR. AFF. 60 (2003). (noting that Bush foreign policy is increasingly labeled as “imperial”).

222. See Ikenberry, *supra* note 163, at 56.

223. *Id.* at 57.

224. *Id.* at 58.

225. *Id.*

226. *Id.* at 58—59.

represented by Senator Jesse Helms.

#### *4. The Bush Doctrine Ignores New Geopolitical Opportunities*

While realist theories of international relations are incomplete, they nevertheless offer insights; states matter in international relations, and big states matter greatly.<sup>227</sup> American foreign policy cannot succeed unless it appropriately engages Russia, China, Europe, Japan and the rest of the Western Hemisphere. The end of the Cold War presents major geopolitical opportunities. The Iraq invasion distracts American foreign policy from those opportunities.

##### *(a) Realignment with Russia is Possible*

The attacks of September 11 and reaction to them provide the best opportunity since the Second World War for fundamental realignment of relationships between Russia and the United States. Three new realities frame this opportunity. First, America and Russia have a common interest in opposing terrorism rooted in Islamic fundamentalism. Second, the military operations in Afghanistan have led the United States to appreciate the importance of South Asia far more than it did fifteen years ago when it armed the Taliban and helped it run the Russians out, and then virtually abandoned the region. Third, Russia's rich petroleum and natural gas reserves represent a potential solution to U.S. dependence on Middle East oil. If Russia comes to supply a greater portion of U.S. energy needs, an important new trade flow will link the countries economically, as the U.S. becomes a growing source of foreign exchange for Russia.

Apart from avoidance of major-power conflict, dealing successfully with smaller-scale problems depends on the willingness of major powers to cooperate. Russia's position was a crucial part of the political and military matrix for success in Kosovo and in Afghanistan.<sup>228</sup> The idea of building a new relationship with Russia represents common ground between the Bush Administration and its critics. The invasion of Iraq represents an approach to relationship building that is destined to fail.<sup>229</sup>

Russia has downplayed Iraq as a problem, and has been more

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227. See Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 432, 470 (2004) (describing state-centric view of realist school of international relations theory).

228. See TIM JUDAH, *WAR AND REVENGE* 272—79 (2000). (describing Russian role in brokering Milosevic's agreement to end the war in Kosovo).

229. As the two following paragraphs explain.

active than the West Europeans in trying to patch things up. On his visit to St. Petersburg before the G8 meeting in mid-2003, President Bush found Putin, for the first time, showing more eagerness to cozy up to U.S. than the other way around. Russia was very helpful in the Security Council on working out language for transfer of power, and international involvement in Iraq. Russia complains about the U.S. doctrine of prevention, but indications are that the opposition comes more from the Russian military than from senior political leaders. The criticism is not very aggressive; it mainly takes the form of saying that “events show that we were right in opposing the Iraq invasion and that we need renewed cooperation.”<sup>230</sup>

This apparent thaw in Russian-U.S. relations is likely to prove illusory in the long run because it has too narrow a base. Russian foreign policy long has reflected paranoia about nationalism and Islam.<sup>231</sup> Enlisting Russia in what appears to be a campaign against Islam and disdaining multilateral structures that otherwise might prove attractive to Russian leadership seeking to define a new place of respect for Russia are likely to encourage Russian unilateralism which will not always serve U.S. interests. If the U.S. should pursue whatever it can get by with, why should not Russia?

*(b) Engagement of China is desirable*

The evolution of China from a closed, authoritarian, ideological, and militaristic society into one desiring economic development driven by market-oriented links to the rest of the world provides opportunities to reduce security tensions in Asia.<sup>232</sup> Instead of viewing China as a military threat to the rest of the world, the United States must reinforce the internal Chinese forces interested in modernization, while reassuring China that its physical integrity is not threatened by openings to foreign

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230. See Steven Lee Myers, *Putin Says U.S. Faces Big Risks in Effort in Iraq*, N.Y. TIMES, Oct. 6, 2001, at A1. (reporting Putin's criticism of U.S.-led invasion of Iraq but also reporting desire to have good relations with Iraq).

231. See Anssi Kullberg, *From Neo-Eurasianism to National Paranoia: Renaissance of Geopolitics in Russia*, EURASIAN POLITICIAN, Issue 4 (Aug. 2001), available at <http://www.cc.jyu.fi/~aphamala/pe/issue4/duginism.htm> (last visited July 8, 2004)(describing internal conflicts in Russian foreign policy thinking).

232. See Wu Zhengyu, *China and East Asia Security in the 21<sup>st</sup> Century—Challenges and Implications*, available at <http://www.dur.ac.uk/chinese.politics/public%20lectures/WU%20Zhengyu%20Durham%20Lecture.pdf>. (last visited July 8, 2004)(noting that China's integration into international community generally has increased stability in East Asia, but that other, more threatening scenarios also exist).



ideas and capital.<sup>233</sup> Helping China build the institutions of a civil society are central to such an approach.

The Bush Administration appropriately places priority on dealing with China, but its policies undervalue the best way to ensure that China interacts with its neighbors peacefully and participates in the world community according to the rules. Advocates of multilateralism believe that China's role in the WTO and U.N. gives it a stake in helping to maintain world order.<sup>234</sup> "Is there any better way, for example, of co-opting the putative next superpower, China, into the international system than to mold its behavior through the WTO and the U.N. Security Council?"<sup>235</sup> The architects of the Bush Administration policy prefer an American policy that identifies China as a threat, to be contained with threat of military force.<sup>236</sup>

Moreover, the Bush Administration has proven bizarrely insensitive to the risks of increased Chinese commitment to weapons of mass destruction.<sup>237</sup> The controversy over Iraq obscures the fact that the Bush Administration actually softened opposition to a buildup of the Chinese nuclear arsenal to buy acquiescence with respect to its plans for a National Missile Defense.<sup>238</sup>

*(c) The Iraq Invasion has pushed off the Policy Agenda Opportunities to lead this Hemisphere into Democracy and Prosperity*

American foreign policy has always included a special regard for conditions in the Western Hemisphere. Its proximity has caused the United States, from the time it expressed the Monroe Doctrine, to insist that no foreign adversary gain a foothold in the Americas. Cuba represents the only significant failure of this policy. Trade relations, common language and cultural ties with Canada make Canadian relations important, even without the possibility that Canada would become a military threat. Improving economic prospects and encouraging stable democratic governments in Latin America reduces the likelihood of security threats from that part of the region. It also presents the best prospects for reducing labor market pressures that

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233. See David Shambaugh, *Facing Reality in China Policy*, 80 FOREIGN AFF. 50 (2001).

234. *Id.*

235. Hirsh, *supra* note 162, at 31.

236. See Shambaugh, *supra* note 233 (global affairs will be "profoundly destabilized" by an American policy that confronts China; U.S. must have strategic vision to "help funnel China's progress in a peaceful, constructive direction.").

237. Hirsh, *supra* note 162, at 35—36.

238. *Id.*

underlie illegal immigration to the U.S. Sustained American engagement, defined by pressure to open up economic competition, to protect human rights and to build the institutions of democracy and civil society has produced much success over the last twenty years toward ending Latin America's reputation as a collection of military autocracies.

Before the invasion of Iraq, the U.S. had two important opportunities for refining and extending this policy into the twenty-first century: Mexico and the Mercosur block: Argentina and Brazil. Under the leadership of President Vicente Fox, Mexico experienced a peaceful political revolution.<sup>239</sup> The United States must continue to encourage political evolution in Mexico by embracing new concepts for managing cross-border product, capital, and labor markets. We must improve our understanding of how Mexicans in the United States interact with their communities of origin. The Mexican Diaspora can be a force for economic development if it is explicitly engaged.

Before its recent economic collapse in Argentina, the Mercosur block was an example of stunning economic and political reform in Brazil and Argentina.<sup>240</sup> Argentina was the model of a country that takes American advice on reforming its economy. In many respects the advice was beneficial. Ultimately, underlying forces in the Argentinean economy brought the experiment to an unhappy end. The U.S. must not only be fully engaged with Argentina's government on steering a course through this crisis, but must learn how to give better advice in the future. Disengagement and indifference risk catastrophe.

The war in Iraq has caused the U.S. to withdraw from embracing these important opportunities to help other countries. A blossoming special relationship between President Fox and President Bush, focused on new solutions to illegal immigration has withered, replaced by mutual antagonism over Mexico's refusal to support the U.S. position on Iraq. Relations with Canada similarly have soured for the same reasons.

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239. See Jorge A. Vargas, *Mexican Law on the Web: the Ultimate Research Guide*, 32 INT'L J. LEGAL INFO. 34, 39 (2004) ("undemocratic" nature of Mexican political changes with election of Fox in 2000).

240. See Thomas Andrew O'Keefe, *The Central American Integration System (SICA) at the Dawn of a New Century: Will the Central American Isthmus Finally Be Able to Achieve Economic and Political Unity?* 13 FLA. J. INT'L L. 243, 254 (2001). (describing the success of Mercosur and its influence as a model for integration elsewhere in Latin America).

*(d) The Iraq Invasion Undermines Pursuit of Effective Trade Policies*

Trade policy is an important tool in achieving America's foreign policy goals. The scheduled negotiations over extension of the WTO agreement, articulation of proposals for expanded free-trade agreements in the Western hemisphere and the growing opposition to the WTO, combine to represent new opportunities for the United States to extend trade. These new opportunities also take into account the need to develop a trade policy that encompasses labor markets as well as product and capital markets. American prosperity depends upon the trade policies in the United States and its trading partners that keep foreign markets open to American goods and services. It depends on trade policies for capital markets that facilitate the flow of foreign investment into the United States and allow American investors to enjoy investment security and reasonable rates of return abroad. More ambitiously, it depends on integrating trade policy with immigration policy, allowing trade agreements to regulate labor markets as well as markets for other factors of production.

The full impact of the Iraq invasion on U.S. trade relations is not yet clear. However, as an example of a new self-interested the American foreign policy it has heightened trade tensions.<sup>241</sup> The success of post World War Two trade liberalization has depended upon willingness by major trading partners to enter into and to respect permanent multilateral agreements. When United States foreign policy is expressed in terms of mistrust of such multilateral agreements, it inevitably raises questions about U.S. commitment to extend the web of multilateral trade agreements. The Bush Administration's imposition of steel quotas reinforced such a suspicion.

*(e) The Iraq invasion makes a Middle East peace settlement less likely*

Continued conflict between Israel and its neighbors jeopardizes U.S. interests because of the U.S. commitment to protect the Jewish Homeland, its sensitivity to the Jewish Community in the United States and the proven tendency of heightened tensions in the region to poison U.S.-Arab relations. For its first fourteen months, the Bush Administration was determined not to get involved in the Middle East – to leave it to the parties to work out or for the Europeans or someone else to solve. Since then attention has been sporadic and mostly

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241. Jeff Madrick, *Economic Science; America is paying a significant price for favoring unilateralism over international cooperation. Is the price too high?* N.Y. TIMES, Dec. 25, 2003, at C2. (reporting increase in trade tension resulting from American unilateralism).

superficial. No U.S. strategy has been articulated to frame U.S. engagement.

Despite the fanfare associated with President Bush's trip to the region and his formal unveiling of a "roadmap" for peace, available evidence suggests that the burst of attention was driven by desire to build Arab-state support for the Iraq invasion.<sup>242</sup> American policy continues to be mostly reactive, motivated perhaps by agreement between the hawkish Sharon government in Israel and influential American neo-conservatives about reliance on force rather than facilitation of negotiations. The mediation of the "Geneva Accords," by private parties in early November 2003 represents a new opportunity. Whether the U.S. can take its eye off of Iraq and ideology long enough to embrace this opportunity remains to be seen.

As it does in many other parts of the world, the Iraq invasion emphasizes the wrong aspects of American power. The invasion exalts conventional military force rather than careful attention to public opinion in resolving conflict and the creation of economic opportunity where little exists as a means of reducing the recruitment of terrorists. American engagement in the Israeli-Palestinian conflict must be framed by a sophisticated, practical, creative and clear plan for dealing with the two sources of deadlock. America must apply its power to assure implementation of mechanisms for bringing terrorism under control. America must also apply its power to assure evolution of a Palestinian civil society, one that does not teach hate to kindergartners, one that offers pathways other than extremism for fulfillment of ordinary human ambition and one that produces real economic progress.

Terror can be brought under control in three ways. Outside forces can apply positive or negative incentives with Palestinians in the hope that they will ease their terror tactics. An outside force can interrupt the infrastructure necessary to support terrorism. For example, Israel or another state can prevent terrorists from reaching their targets. The United States must be engaged in all three of these approaches. The United States must increase incentives (not just issue Presidential edicts) for the Palestinian leadership to get the hate out of the schoolbooks and their political speeches. The United States must support action to interrupt terrorist infrastructure, including Israeli Defense Force action in the Palestinian territories unless someone else

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242. See Quartet Roadmap to Israeli-Palestinian Peace, *available at* <http://www.mideastweb.org/quartetrm3.htm> (last visited July 8, 2004)(reporting that Bush Administration responded to post-Iraq-invasion pressure to release new version of roadmap).

in the international community is prepared to perform the task. And the United States must insist that states now providing safe passage to terrorists on their way to targets in Israel (and elsewhere) exclude them.

Progress in the Palestinian territories cannot come through the Palestinian Authority. The demonstrable lack of economic progress, the obvious corruption, and the large infusion of foreign aid from Europe, the Arab communities and the U.S. make it certain that leadership is necessary. Effective engagement in the Middle East means U.S. leadership for a regional economic development initiative, bringing together substantial economic aid, technical assistance and culturally compatible mentoring from the EU, the U.S., Saudi Arabia, Egypt, Turkey and elsewhere. The plan must involve direct administration of projects by the regional authority or its joint venturers; it cannot simply turn money over to the Palestinian Authority. Over time, the regional authority would devolve more control to local authorities as they prove their capacity to function honestly and effectively.

This program must focus on the economic sphere; not the political and security spheres even though the three spheres obviously are interrelated. The conceptual model is multi-lateral, not unilateral. This model is that of the European Iron and Steel Community, which was started alongside and in parallel with NATO at the end of World War II, motivated by the realization that economic development is a necessary condition for political stability, and that the common effort and mutual trust that grows out of economic relations can blossom into trust and formal arrangements in the political and security spheres. For example, some form of international presence in the region might be helpful, ranging from a handful of U.N. monitors to a Kosovo-like military presence. The Iraq invasion undercuts U.S. leadership in putting together such a regional economic and security plan.

##### *5. The Bush Doctrine avoids fundamental restructuring of America's defense capability*

America must design its military and naval force structures to support its campaign against terrorism and to support its new commitments to nationbuilding, in addition to performing its more traditional roles of protecting against state-based military threats. Clausewitz famously observed that "war is simply a continuation of political intercourse, with the addition of other means."<sup>243</sup> Defense

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243. CARL VON CLAUSEWITZ, ON WAR 605 (Michael Howard ed. & Peter Paret trans., Princeton 1976) (commenting that "war is the extension of politics by other means").

policy must be developed to serve foreign policy.<sup>244</sup>

National defense strategy must be based on a sophisticated understanding of how the armed forces can respond effectively to each threat. Threats to U.S. security come not only from potential attacks launched by foreign states, but also from armed groups like al Qaeda. Threats may also come from sheer hopelessness in places like the Ukraine, which is driving newly independent states back into the arms of traditional protectors like Russia.

Peacekeeping and war-fighting missions are not entirely distinct; in fact they overlap. The best force-structure and training approaches increase the overlap as much as possible to avoid the need for two armies, one for peacekeeping and one for fighting a war. The appropriate doctrine can increase the amount of overlap. For example, a peace enforcement doctrine can call for use of military forces to secure and pacify an area for a limited period of six months, and then to withdraw, with a rapid-response capability if trouble overwhelms other forces. ("Other" forces must, of course, exist.<sup>245</sup>)

One example of this problem can be found in General Wesley Clark's book about the Kosovo conflict. There he reveals that U.S. military leaders were reluctant to provide resources to win the campaign in Kosovo because they wanted to protect options to fight hypothetical conventional wars in other parts of the world.<sup>246</sup> Clark also discusses the reluctance of the U.S. defense establishment to reinforce the civil aspect of the peace accords in Bosnia.<sup>247</sup> Such reluctance must be overcome; the armed services have important roles to play in peacekeeping, nationbuilding, and anti-terrorism. The United States should spend more money on training personnel to be effective

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244. One worrisome trend in the United States is the tendency of the armed forces and their advocates to constitute a separate interest group, suspicious of political leadership, and separated from the mainstream of American society by ideological differences. Such a cleavage is, in large part, a product of the Vietnam War and of the end to the draft. Too many Americans have no experience with the military, and too many military leaders have scant experience with other aspects of American life. This division is dangerous in the long run. In the short run, it leads to an illogical distinction between military missions, and peacekeeping and nation-building activities, thought to be entirely outside the competence of the defense establishment.

245. See Henry H. Perritt, Jr., *Policing International Peace and Security: International Police Forces*, 17 WIS. INT'L L.J. 281 (1999) (arguing that the international community should develop better capability to perform policing functions in post-conflict situations).

246. WESLEY K. CLARK, *WAGING MODERN WAR* 312—3 (2001)(describing Army reluctance to commit ground forces in Kosovo because of impact on ability to meet threats elsewhere in world).

247. *Id.* at 62—3. (reporting concern about "mission creep" and steps taken to reduce the likelihood of U.S. military getting drawn into civilian and law-enforcement matters).

peacekeepers and adjuncts to building a civil society in places like Iraq, Kosovo, Afghanistan, East Timor, Indonesia, the Philippines and Somalia.<sup>248</sup> American defense strategies must accommodate the need for peacekeeping and peace enforcement. There is a valid distinction between military and police operations. An international police force is a desirable tool; the U.S. armed forces should not be the only available tool when violence breaks out.

The mismatch between the forces available and the problems to be solved is manifest in the Bush Administration's approach to the missions in Iraq and Afghanistan; in the professed inclination of U.S. military leadership in Afghanistan to keep its distance from the U.N.- and British-led initiative to establish an interim government and to rebuild Afghanistan.<sup>249</sup> The U.S. defense establishment needs more than policing and peace enforcement capability. In Iraq, the political trusteeship is organized through the Department of Defense.<sup>250</sup> If this pattern is followed in the future, the U.S. Defense Department must have expertise in civil administration and democracy development. Also, because terrorism looms as a new major threat, U.S. military doctrine and capability must be supported by more robust theories on the dynamics of terrorism and on what kinds of force application can interdict terrorist activities. Donald Rumsfeld's stated commitment to reform military force structures is too narrow. It focuses only on the military aspects of national security capability and neglects the political aspects, where the most creativity and policy leadership is needed.

#### 6. *The Bush Doctrine increases the risk of a "Clash of Civilizations"*

Samuel Huntington's book, *Clash of Civilizations*, has infected some neo-realists in the Bush Administration with the view that a collision between the Islamic world and the rest of the world is inevitable. If one believes this, the best American foreign policy is one that opposes the Islamic world aggressively. America should not put resources into nationbuilding efforts in Muslim countries because they are destined to fail.

There is growing evidence that this bleak view of international

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248. See Cohen, *supra* note 221, at 61 (arguing that U.S. should recruit and train cadres of administrators to supplement military capability in post-conflict situations); *Building Civil Capacity for U.S. Stability Operations*, U.S. Institute for Peace Spec. Report No 118 (Apr. 2004) (recommending development of "Rule of Law Reserves").

249. *A Job Half-Done in Afghanistan*, N.Y. TIMES, May 15, 2003 editorial (criticizing Bush Administration for failing to focus sufficiently on magnitude of internal-security and civilian-reconstruction tasks).

250. See *supra* Part II.A.1.

politics is unwarranted. Certain U.S. and European policies might indeed reinforce tendencies toward a clash of civilization, but other policies could reduce the potential for such a clash. Despite the calming rhetoric by President Bush after September 11 to urge the American people not to retaliate against Muslims, the subsequent attacks on Iraq and Afghanistan played into the hands of Islamic fundamentalists who could portray the United States as implacably hostile to Islam and Muslim countries. The devaluation of multilateral institutions suggests that the United States lacks respect for the many smaller countries—many of them with significant Muslim populations—that participate through international organizations such as the U.N. The Bush Doctrine undervalues development of U.S. capacity to understand the forces at work in the Muslim world, where modernization clashes with traditional religious values and customs. This reinforces the perception that the United States is insensitive to the Islamic community.

In Iraq, with U.S. reluctance to accept the aspirations of many Iraqi citizens to establish an Islamic Republic, the impression increases that the United States is hostile to Islam as a matter of policy. The Bush Administration's National Security Strategy is likely to make the clash of civilizations a reality even though that is not the inevitable course of the future.

The Bush Administration, by placing undue reliance on military force, fails to embrace what would be the most potent weapon against terrorism: "a powerful, inclusive idealism with which the world can identify—a counter vision that will dispel the lingering attractions of Islamism, especially for younger generations in places such as Iran and the Palestinian territories. . . . Islamism must also be crushed in the world of ideas. . . . If the United States is in fact draining the swamp of terrorism—which is doubtful—it is certainly not filling it back in with something more appealing."<sup>251</sup>

### *C. Failure in Iraq will undercut the credibility of the Bush Doctrine*

While the easy military victory in Iraq might have instilled temporary fear in foreign regimes about what could happen to them if they opposed the U.S., U.S. credibility is undermined by the confused and chaotic progress of building a "model democracy" after the war, and intelligence failures or outright deception about the presence of weapons of mass destruction in Iraq. If the U.S., despite the priority placed on building a model state in Iraq, cannot succeed in doing so,

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251. Hirsh, *supra* note 162, at 27-28.



why should others fear U.S. intervention or follow the U.S. lead in framing policies on how to deal with other crises? The demonstrated cost of poor U.S. understanding of the politics of constructing a liberal democracy in Iraq will encourage others on the international scene to question U.S. diagnoses and prescriptions and to prefer their own, whether the issue is the effect of economic sanctions, or the likelihood that another state possesses weapons of mass destruction.

While the Administration may learn from its mistakes in Iraq, the fact remains that some of the missteps suggest that the Administration is not serious about its commitment to nationbuilding or to innovative forms of intervention. The Defense Department turned its back on an extensive State-Department planning process for post-war Iraq. It also shut down the peacekeeping school at the Army War College in the middle of the Iraq intervention. No one from the Administration called the leaders of the American Bar Association's CEELI, which probably has more knowledge on the rule of law in developing countries than any other U.S. institution. The Bush Administration has taken an Army lacking in "peacekeeping" skills and thrust it into nationbuilding role, even as it fails to reform the military. This is evidence that the Bush Doctrine is infeasible.

The outcome of the U.S. intervention in Iraq will have an enormous impact on American ability to pursue a realist foreign policy. The logic of the National Security Strategy document depends on the willingness of foreign states to accept the premise that the U.S. power is overwhelming and that they oppose it at their peril. They may acquiesce to American commands out of fear of the consequences of military action against them. However, if military action against Iraq is unsuccessful in the long run, they will have less to fear. The leaders of foreign states are often astute in their assessment of American politics. There is every reason to believe that the leaders of North Vietnam and the Viet Cong perceived that eventually American public opinion would withdraw its support from American involvement in Vietnam. Accordingly, they consciously pursued a strategy of attrition, aiming at reaching the point in which America would withdraw. Their assessment was accurate, and they eventually prevailed.

The same thing is likely to be the case going forward. Leaders of foreign states opposing the United States may be inhibited by the probability that American military intervention would drive them from power, but they also recognize that America's willingness to use its military power will be conditioned on its past experience. A failure in Iraq will make America more reluctant to use military force in the future

to depose foreign regimes, and foreign leaders will understand that.

It may be that the Administration disdains a military role in nationbuilding. The fact is that it structured the political trusteeship in Iraq so that —nationbuilding was the responsibility of the Defense Department, apparently because it viewed other parts of the U.S. government and of the international community as unequal to the task. Donald Rumsfeld's campaign for restructuring the U.S. military is not having any discernable effect aside from the greater use of technology and lighter army units in conventional warfare. Nothing tangible is occurring with respect to fighting terrorism or enhancing peacekeeping or nationbuilding capability. Despite widely recognized limitations on the ability of the U.S. military to perform peacekeeping and nationbuilding missions, the Bush Administration closed the peacekeeping school at the U.S. War College in Carlisle, even as it was preparing its invasion of Iraq.

Out of scores of papers posted on the Army War College, Naval War College and National Defense University Web sites, almost none address fighting terrorism; instead, they focus on traditional issues of conventional war and geopolitical strategy. An urgent priority is to begin to develop some intellectual capital about the military role in fighting terrorism. A good start would be to evaluate shortcomings in U.S. doctrine in Vietnam, Afghanistan and Iraq; to see what lessons also can be learned from the British experience in Ireland; and to analyze the frustrating experience of U.S. military involvement in the drug wars. It is likely that such a review would result in new ideas for integrating military activities with civilian activities in the intelligence and economic development spheres and an understanding of the potential and limitations of special operations focused on nodes in terrorist networks.

*D. Any Alternative to the Bush Doctrine must be as Popular with the American People*

Central to the argument that the Bush Doctrine is unsatisfactory and that the invasion of Iraq undercuts important U.S. foreign policy goals is the proposition that democratic politics in other places matters. Democratic politics in the United States matters too. No U.S. foreign policy can become a reality if it does not command support of the American People, no matter how sound in terms of international relations theory, no matter how compliant with international law, no matter how popular abroad. A President must not only have a logical foreign policy, one that works in the world; he also must be able—and

willing—to sell it domestically. Successful salesmanship is a necessary, not a sufficient, condition. Presidents can sell foreign policies that will not work.

American foreign policy always has contended with competing isolationist and idealist currents in American public opinion. Its content has been determined as much by pragmatic American politics—what will sell at the ballot box—as by the merits of contending realist or idealist theories of international relations—the product of universities and think tanks.<sup>252</sup> Theory helps make policy messages coherent, but the political process of forming positions and platforms draws as much from perception of interests that will move voters and opinion leaders as from theoretical analysis by experts. The natural tendency of policy in a democratic society to borrow a bit from contending advocates so as to gain a measure of support from both.<sup>253</sup>

The history of American foreign policy teaches that the idealist current in American public opinion does not represent a critical mass. The failure of the Wilsonian commitment to the League of Nations and to self-determination after World War I is strong evidence of that proposition. Understanding the post World War II U.S. commitment to the United Nations and to the other elements of the multinational treaty framework for international relations after the war is incomplete if it considers only the idealist motivation. Another motivation reinforced idealist tendencies: fear of the Soviet Union. The argument that won widespread bi-partisan support for a multilateral foreign policy was a combination of idealism and realism: the same multilateral institutions that represented an export of American ideals of democracy and self-determination were ones that plausibly were well calculated to resist the threat from the Soviet Union and world Communism. Even in that political context, NATO and the Marshall Plan won stronger support than the United Nations, precisely because they were easier to link with defenses against military and economic threats to the United States.

The Bush Doctrine and the invasion of Iraq were popular because the President persuaded the American People that they were necessary responses to the heightened threat to the U.S. after September 11, even though they flouted idealist commitments to multilateralism. Any alternative to the Bush Doctrine will not gain the same measure of

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252. Ikenberry, *supra* note 163, at 45—46 (noting realist orientation of containment and deterrence, and idealist orientation of open trade, democracy and “institutionalized relations” among states).

253. See Ikenberry, *supra* note, at 48 (characterizing two “grand strategies” of realism and idealism as rooted in “divergent, even antagonistic, intellectual traditions”).

public acceptance in the U.S. unless it credibly can be justified as necessary to protect American against concrete threats. Merely advancing idealist arguments risks public rejection and a retreat into isolation. The hard challenge for proponents of alternatives to the Bush Doctrine is to develop and present a foreign and national-security policy strategy that gains popularity both in the United States and abroad, especially among publics that otherwise may be drawn into supporting militant anti-Americanism and terrorism.

*E. A New Kind of Peace Corps for the Twenty-First Century can Reduce Genesis of terrorism and Can Project America's Inspiration*

This article argues that the essential core of American foreign policy is that it recognize the influence of public opinion in foreign states. Public diplomacy is an essential—one might say the most essential—tool in the American foreign policy arsenal. Effective public diplomacy requires a larger budget for public diplomacy institutions in the United States and an effective message transmitted by official U.S. sources. Diplomacy also requires thousands of individual ambassadors of goodwill presenting American role models and American points of view in foreign countries. Such outreach was part of the original justification for the Peace Corps. As important as a restructuring of U.S. military forces to increase their capability to engage in peace building and nationbuilding, is recognition that America needs another kind of foreign outreach. It is time to reinvent the Peace Corps.

The United States needs a new mandate for a Peace Corps for the twenty-first century, to enlist young Americans to build civil society in countries in transition. This new organization should enlist disaffected youth from target countries. The logic supporting such an initiative is compelling. Small numbers of committed young people can make a difference in helping to build the institutions of a rule of law, civil society and market economies.

A new mandate for the Peace Corps would focus on recruiting volunteers interested in building the institutions of a civil society. Iraq, Afghanistan, Indonesia, Saudi Arabia and Egypt come to mind as early targets, but obviously dozens more exist. The new Peace Corps would be trained, not just to dig wells, teach in primary schools, and dispense medicines; it would be trained to develop the institutions of liberal democracy and of market economies. New Peace Corps volunteers would help build political parties and run political campaigns; they would be able to organize chambers of commerce, write business plans, support campaigns to attract foreign investment and nurture

development of e-commerce as a channel for small business entrepreneurship.

The new Peace Corps could be shaped to facilitate cooperation and multilateralism. A regional approach might be useful, focusing efforts on "change agents," individuals (or maybe institutions or even countries) that others in the community and society look to and trust. Once ideas and institutions take root in a region, they look more "organic," and less threatening, to neighboring countries and peoples.

The major elements of a new Peace Corps, distinguishing it from the present Peace Corps would be:

- A focus on young professionals who are embarked on or who seek careers in foreign affairs or international business
- Integration with any future requirement for a period of national service, as a part of, or an alternative to, a reinstated draft
- Acceptance of foreign nationals into the new Peace Corps
- Deployment of members to carry out concrete projects related to democracy development, economic development, and rule of law
- Assignment of members to work alongside nationals of target countries as "coaches"

The design of the new Peace Corps should draw upon the largely successful experience of the American Bar Association's Central European and Eurasian Law Initiative and on the ideas presented by Eliot Cohen for recruitment and training of a new cadre of professionals qualified for nation building and by USIP for a Rule of Law Reserves. Among other models is the White House Fellows program, in which promising young professionals are assigned to work for one year in White House Agencies and for federal cabinet officers.

Despite President Bush's call for reinvigorated volunteerism in his 2002 State of the Union message, the Administration has given almost no attention to embracing opportunities to make this a reality through recruitment of young people to work on nationbuilding in places that need it. The Administration is too busy managing its invasion of Iraq.

#### IV. CONCLUSION

It is not so much that the U.S. needs some new grand theory of international relations; it knows the theory: security, political and economic partnerships with other states are "critical components of an American-led world political order...through which U.S. power is

leveraged and made more legitimate . . . ”<sup>254</sup> The Bush Doctrine and the invasion of Iraq represent a failure to adapt received theories of international relations. The mishandling of the Iraq conflict, shaped by willful ignorance of lessons learned from other political trusteeships bespeaks indifference to the new realities of America’s foreign affairs. The Iraq invasion and the Bush Doctrine undercut American legitimacy and its hard-earned reputations for moral leadership and effectiveness.

The cultural war in American foreign policy is not a clash of competing theory; mainstream American foreign policy has never been purely realist or purely idealist; indeed, it would be surprising were it so because of the natural tendency of policy in a democratic society to borrow a bit from contending advocates so as to gain a measure of support from both.<sup>255</sup> It is a clash of competing pragmatic visions: a clash between those who want to avoid the messy realities of engaging complex political forces in a changing world and those who are willing to provide leadership to shape the direction in which those forces are applied.

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254. Ikenberry, *supra* note 163, at 48.

255. *Id.* at 60 (noting realist orientation of containment and deterrence, and idealist orientation of open trade, democracy and “institutionalized relations” among states). *See id.* at 48 (characterizing two “grand strategies” of realism and idealism as rooted in “divergent, even antagonistic, intellectual traditions”).

