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American Exceptionalism: The Exception Proves the Rule American

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ARTICLE

AMERICAN EXCEPTIONALISM: THE EXCEPTION PROVES THE RULE

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As a statement about proof, the phrase 'the exception proves the rule' is nonsense. Proof comes from the affirmation of a meaningful proposition, and behavior that contradicts a rule can scarcely be said to confirm it. But consider instead that the word 'prove' at one time meant 'provide,' and then make the substitution. Does the exception provide the rule? Indeed it does. It tells us the boundary conditions for the application of the rule: "i" before "e" except after "c"; months have thirty or thirty-one days, excepting February. This is the case even, perhaps especially, in law: all persons born in the United States are eligible to serve as president, except those who would be under the age of thirty-five when inaugurated.

Against this idea of law is the notion that law can never fully provide rules for the uncertainties and crises of life and, therefore, the exceptional is the essentially not-rule-bound. This is the import of Carl Schmitt's famous statement, "Sovereign is he who determines the exception," and this is the charge made against U.S. behavior on the international scene. It is alleged that the U.S. has sought an imperial role in the world, deciding when and when not the rules of law apply to it. As Schmitt suggested, this would make the U.S. a world sovereign, and that is precisely what it is accused of becoming.

Public opinion has been mobilized against the U.S. for holding international institutions and agreements in contempt by demanding a double standard—such that less rigorous rules are applied to American action than to that of others. I will argue, however, that the American positions on some of these matters, however inartfully they have been articulated by the representatives of the administration, are reasonable ones in light of the unique security responsibilities the U.S. is bearing on behalf of the world order.

Advocates of the international status quo are most distressed about U.S. rejection of the *Landmines Treaty*, the *International Criminal Court*, and the U.S. withdrawal from the *Antiballistic Missile Treaty*. Much criti-

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cism has been leveled at the Bush Administration on these accounts. Yet I doubt that the U.S. is likely to have supported any of these agreements if Al Gore or John Kerry had been elected, because American participation in these accords does not contribute to the strategic stability either of the U.S. or the world generally. Indeed they are especially pernicious because they would ensnare the U.S. at a time when world order uniquely depends upon American action, not because the U.S. is an empire but because of precisely the opposite: rather than controlling its allies, the U.S. has given them security guarantees without putting proconsuls in Seoul or Paris or Ankara. These countries have quite reasonably diverted resources that would otherwise have gone into defense. None of them accept responsibility for the security of states outside their region.

Let me briefly take up three controversial cases in which the U.S. is widely taken to have applied double standards, exempting itself from rules that otherwise would apply to all similarly situated states.

Landmines are useful in military defense because they last—that is, they do not fall silent when a tactical position is lost, and they do not require troops therefore to maintain a position in order to give fire. But this is also why landmines pose a humanitarian problem, for long after the battle is over they continue to explode when someone approaches them.

This does not have to be the case. Timing mechanisms can be used that cause landmines to be deactivated within as little as a few hours or as long as thirty days, which is the maximum allowed under the Convention on Conventional Weapons, to which the U.S. is a party.

The Ottawa Convention of 1997 (The Landmines Treaty) bans only antipersonnel mines and freely permits all types of anti-vehicular mines. Few members of the public realize that antivehicular mines are every bit as dangerous to civilians as antipersonnel mines. As Richard Garwin has noted,

> Decades after a conflict has ended, persistent anti-vehicle mines continue to kill people in buses and trucks. By causing road closures, they prevent refugees from returning to their lands and keep humanitarian assistance from getting to where it is needed. Currently, for example, 70% of the main roads in Angola are blocked by anti-vehicular mines.[1]

In fact the landmines controversy has largely served as a rhetorical weapon with which to shame the U.S. public; but the public is generally not aware that the proposed treaty only bans one class of explosives, or that the U.S. policy of deploying time-sensitive mines—weapons that effectively turn themselves off—would actually do more to reduce civilian casualties if it were universally adopted than if the Ottawa treaty were universally applied.

1. Richard L. Garwin, *Bush Sets the Right Course in Control of Land Mines*, L.A. Times B11 (Mar. 8, 2004) (available at http://www.fas.org/rlg/040308-latimes.htm).

It is now U.S. policy not to use any persistent landmines after 2010; this policy covers all mines, both those that target persons and vehicles.

To compare the two policies, imagine two minefields, one laid by the U.S. and one by, say, Belgium, which is a party to the Ottawa Convention.[2] The U.S. minefield contains only devices that self-destruct in a maximum of thirty days; the Belgian field has antivehicle mines that will be active indefinitely, some of which will explode if a person merely kicks the mine or turns it over. Yet one seldom hears criticism of those states that are parties to the Ottawa Convention but not to the Convention on Conventional Weapons;[3] indeed, they are the most vocal of U.S. critics on this score.

Even so, wouldn't the world be better off if the U.S. simply banned all mines—or at least all antipersonnel mines prohibited by the Convention? That would apply a ban to the 38th parallel, which separates North from South Korea, and which is virtually the only place where the U.S. currently has deployed landmines—in a no-man's land where a highly dangerous and unpredictable regime has put a million heavily armed troops within twenty-five miles of the South Korean capital. No realistic conventional force could be protected from such a huge North Korean force without mines; indeed, there is some doubt whether the current forces deployed on the 38th parallel are not merely hostages even with such protection as the mines afford. Would it really be a step towards peace on the peninsula to remove this barrier? Would Canadians and Swedes, who have been most critical of the American deployment of mines, be willing to take up these responsibilities with their own forces (with or without landmines)? Without U.S. extended deterrence, which is assured by the presence of U.S. ground forces, it is highly unlikely that South Korea would be content to remain a non-nuclear power in light of North Korea's acquisition of nuclear weapons, with all the consequences for nuclear proliferation to Japan. Surely this is not a step toward a safer and more humane world.

The *International Criminal Court* ("ICC") has also generated a good deal of debate as to whether the U.S. should submit to its jurisdiction. America has been a prime mover behind the human rights courts convened to adjudicate war crimes at Nuremberg and lately in The Hague. Slobodan Milosevic was being tried at U.S. insistence. Why not try him before a permanent rather than *ad hoc* tribunal? The issue is not, it turns out, the permanent status of the ICC, but the fact that it is not governed by any political body as are the *ad hoc* tribunals that must answer to the UN Secur-

2. *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction* (Sept. 12, 1997), http://untreaty.un.org/English/millennium/law/disarmament/xxvi_5E.htm.

3. *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects* (Oct. 10, 1980), http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/f6426235883f9d62c12564 1e0052d53d?OpenDocument.

ity Council. Sensitivity to this fact had led many to question whether the U.S. would use its veto power in the UNSC to shield war crimes. There is no evidence that this would occur. The U.S. is at present in the process of court martialing an American officer who fired his revolver in the presence of an Iraqi hostage to frighten him into disclosing the whereabouts of his armed collaborators. U.S. military tribunals in 2005 handed down stiff sentences to prison guards who grotesquely abused Iraqi prisoners.[4]

Others have suggested that Washington is afraid that some new American adventure—because the court's jurisdiction is not retroactive—will be the subject of a prosecution; this is probably right. That isn't because it is U.S. policy to commit war crimes; rather, the U.S. doesn't want the ambitions of a special prosecutor answerable to no political body—remember Kenneth Starr or Lawrence Walsh?—to give free rein to the unlimited investigative power of the prosecutor before any trial ever takes place. The U.S. has had experience with such a prosecutorial institution and practically no one—including its original authors—supports such an institution today.

Not surprisingly, the U.S. fears that such an institution risks tipping the balance against intervention in marginal theatres. As long as the society of states depends upon American soldiers to protect human rights in Kosovo, Bosnia, Afghanistan, Somalia, Panama, Haiti, and elsewhere, that community shouldn't want this either. The spectacle of U.S. soldiers being tried before a foreign tribunal for acts committed in the course of intervention should give anyone pause who wishes to persuade Washington to undertake those missions. It is difficult enough to muster public and Congressional support for these interventions. Imagine what would happen if an American soldier accused of war crimes was handed over to the ICC for prosecution after the U.S. declined to indict him—for that is the only time such a subpoena would issue. Is confidence in the American prosecutorial system so bleak that anyone would relish such an event, knowing the backlash against humanitarian interventions that would ensue? It was the Somalia debacle, it must be remembered, that led directly to the horrors in Rwanda because after American soldiers had been mutilated in Mogadishu there was no willingness to engage them again in an African humanitarian mission.

It may be, however, that some powerful states prefer to have leverage over U.S. action rather than have its help for the benighted areas where that help is most desperately sought. It was American allies, we must remember, who for more than half a decade blocked U.S. intervention in Yugoslavia, which, as will usually be the case, had little consistent support among politicians or the American public.

4. See, for example, the case of Specialist Charles A. Graner, Jr., who was found guilty, sentenced to ten years in prison, and given a dishonorable discharge. *E.g.* Kate Zernike, *Ringleader in Iraqi Prisoner Abuse Is Sentenced to 10 Years*, N.Y. Times 1.12 (Jan. 16, 2005).

In 2001, the U.S. exercised its rights under a provision of the *Antiballistic Missile Treaty* (ABM Treaty) and served notice that it would terminate its participation in the treaty regime after a period specified in the treaty. Much informed opinion[5] that deplores the prospect of a national missile defense system has supported withdrawal from the ABM Treaty because this paves the way for boost-phase,[6] theatre missile defense systems that, far from encouraging arms races, tend to strengthen deterrence. Russia, after initial criticism of the U.S. position, has accepted the move. Why is the rest of the world so upset? Are these countries really worried about a new arms race between the U.S. and Russia? Or is it rather because the renunciation of this treaty will remove an impediment to the development of anti-missile defenses by the United States? Other countries, including some U.S. allies, had rather not see these defenses deployed—even if they might mean greater protection for their peoples—because they also mean greater freedom of action for the U.S. and impossible defense expenditures if other states try to match these deployments. Yet the deployment of regional, theatre missile defense systems by the U.S. would offer the best strategy for stopping the proliferation of nuclear weapons in the twenty-first century, just as extended deterrence provided the twentieth century with its most important nonproliferation successes in Germany and Japan. That is because such systems can nullify the strategic threat presented by modest nuclear systems to countries like South Korea, Taiwan, Israel, and others.

The institutional and legal status quo is far from sufficient for states that confront growing vulnerabilities, which increase with growing wealth, and transnational challenges that defy the national basis for interstate relations. Nor does an imperial role for the U.S. that would defy these institutions offer much to the United States. Neither has much to offer a world order that depends upon American willingness to underwrite the use of force with the young lives of its people and the taxes of its heavily indebted economy.

Unless international law is reformed to recognize and to support the strategic burdens the international community has placed on the U.S., the climate for shouldering those burdens will not improve, and American regard for international rules will not strengthen. Those rules may well enshrine different legal standards for states that carry different international security responsibilities. Indeed, these standards may be differently applied

5. Richard L. Garwin, Presentation, *Elimination of the Longterm Humanitarian Hazard of Stockpiled Antipersonnel Landmines* (Irvine, Cal., Jan. 13, 2000) (available at http://www.fas.org/rlg/000113-landmine.htm) (presentation to Committee of the National Research Council in his capacity as Chairman of the State Department Arms Control and Nonproliferation Advisory Board).

6. Boost-phase intercepts attempt to destroy the ballistic missile shortly after it has left the launching pad, where it is most detectable and when it is moving most slowly. *See* Congressional Budget Office, *Alternatives for Boost-Phase Missile Defense* ch. 1 (July 2004) (available at http://www.cbo.gov/showdoc.cfm?index=5679&sequence=0).

depending on the internal, constitutional order of the state: it is absurd to believe that we should be no more concerned about North Korea's weapons programs than about Norway's. But this doesn't make either state an exception, except perhaps in this sense: the exception provides the rule.