Reevaluating Bush’s War on Terror: Why Human Rights and Civil Liberties are Essential Tools for and not Obstacles to Security
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The world has become a different place since the terrorist attacks of September 11, 2001. Attacked on the home front, Americans have been exposed to a level of vulnerability never previously experienced. The threat of terrorism has been placed squarely on the agenda of the international community for the first time. The unprecedented menace of global terrorism poses new dangers to the security of the United States and the entire world. Often overlooked, however, is how the Bush administration has contributed to this deterioration. In its war on terror the administration has negatively impacted rights both at home and abroad by restricting civil liberties and human rights in the name of security. Few would disagree that rights have indeed been restricted since the September 11 attacks. Not all would agree, however, that this is having unfavorable and harmful consequences. After all, some argue, the administration is fighting terrorism and needs increased powers to protect not only our country but the entire world. Terrorism is a threat unlike any other and eradicating it requires the sacrifice of certain freedoms. This view is inherently flawed. The Bush administration is only superficially committed to human rights; through words but not through action. As a result of the administration’s war on terror policy the U.S. and the rest of the world have become a worse and less safe place. The U.S. has lost its legitimacy as a leader of human rights and encourages other nations to violate international human rights standards. At the heart of the problem lies the fact that this
policy is based on the dangerous fallacy that rights and security are antagonistic goals. The opposite is true: human rights and civil liberties are essential to combating terror and ensuring our security.

The first section provides a history of U.S. policy towards human rights and civil liberties. This history is by no means consistent. The U.S. has been willing to both support oppressive regimes and take leadership in the development of international human rights law. The actions of past administrations demonstrate that the U.S. has a history, especially during the Cold War, of being committed to rights in its domestic and foreign policy only insofar as they do not conflict with the security concerns that it deems more important. Section two demonstrates how the Bush administration is more willing to undermine rights and liberties as part of its war on terror policy. This is evident in specific restrictions on human rights and civil liberties that have been prompted by the war on terror. The third section analyzes the impact of such restrictions on the U.S. itself and on the international community. Section four explores the heart of the problem: that the administration believes that there is a necessary tradeoff between security and rights. There is no such tradeoff. Human rights and civil liberties are essential to security and not a hindrance to it.

1 History

What is exceptional here is not that the United States is inconsistent, hypocritical, or arrogant. Many other nations, including leading democracies, could be accused of the same things. What is exceptional, and worth explaining, is why America has both been guilty of these failings and also been a driving force behind the promotion and enforcement of global human rights. (Ignatieff 2)
The United States has a very checkered history of rights promotion. One of the U.S. government’s most controversial foreign and domestic policies was that of its Cold War administrations. During the Cold War the U.S. supported oppressive regimes so long as they served its political interests in the fight against communism. Civil liberties were also threatened at home by the Red Scare and the rise of McCarthyism. This section is divided into two histories: one of human rights and one of civil liberties. There are numerous ways of categorizing rights, but for the purpose of this paper they will generally be categorized as human rights and civil liberties. Human rights are conventionally considered to be rights that every human being is guaranteed simply because of his or her humanity. Civil liberties, on the other hand, are rights that are guaranteed, maintained, and protected by the state. However, in many cases human rights and civil liberties overlap. Many civil liberties that one would not traditionally regard as fundamental human rights, such as the right to a fair trial, are also protected as fundamental human rights in international law. Furthermore, some governments guarantee and enforce international human rights law in their own systems and not just as a matter of international principle. Civil liberties, for my purposes, will predominantly concern the United States’ own citizens while its human rights policy will generally concern the government’s stance on the human rights of foreign countries and their citizens and its recognition of international human rights law. The history of human rights thus focuses on the foreign policy of the government while the history of civil liberties focuses solely on domestic policy. In addition, as my intention is to specifically address issues of security, the section on civil liberties only examines instances of war. I will also use ‘policy’ to denote an administration’s foreign or domestic policy as it
specifically concerns rights and liberties rather than, for example, its economic or environmental policy. Furthermore, it should not be assumed that any one administration even has a single policy towards, for instance, human rights. As will be demonstrated, many administrations reserved different policies for itself, its friends, and its enemies. The U.S. government was by no means consistent.

*Human Rights*

The concept of international human rights did not emerge until after the Second World War. The atrocities of World War II, especially the Holocaust, incited nations to create an organization that would protect human rights and prevent such horrors from ever happening again: the United Nations (UN). The United States played a leading role in its inception and development. The UN was founded greatly with the help of the U.S. The League of Nations, which it replaced, had been strongly supported by Woodrow Wilson, who emphasized the importance of and need for an association of nations to prevent war in his famous Fourteen Points speech. The U.S. also took the lead in the Nuremberg Trials of former Nazi leaders. Eleanor Roosevelt was the chairman of the committee that drafted the Universal Declaration of Human Rights (UDHR). And years before the creation of the UN and the UDHR, Franklin Delano Roosevelt outlined what he believed were essential human freedoms: freedom from speech, freedom of religion, freedom from want, and freedom from fear – the legendary Four Freedoms. U.S. policy, however, would not be consistent in its support of human rights in the years to come.

The U.S. government has a notorious record of supporting regimes with abysmal human rights records during the Cold War simply because they were anti-communist.
All of this was in the name of containing the communism threat; that is, in the name of U.S. security. Administrations had a policy “of seeking strategic and material advantage irrespective of the unrepresentative or repressive nature of a given regime” (Khalidi 46-47). The government was willing to overlook a country’s human rights record if that country provided the U.S. with some economic or political advantage. Human rights and anti-communism were regarded as an acceptable tradeoff. For the United States during the Cold War “anything was better than a totalitarian Marxist regime,” even if it was a vicious authoritarian one (Hook and Spanier 157). In Chile, for example, President Richard Nixon’s National Security Advisor and Secretary of State, Henry Kissinger, directed covert CIA operations to undermine and eventually oust Salvador Allende, who had been the first democratically elected socialist president in Latin America, on September 4, 1970 (Kornbluh xiii). Nixon himself explicitly instructed the CIA to foment a coup to prevent Allende’s inauguration (1). Among his directives was the order to “make [the] economy scream” (2). The CIA induced coup would result in Allende’s death and the rise to power of Augusto Pinochet, whose brutal military dictatorship would rule Chile for twenty-seven years. Pinochet, despite his record of human rights violations, received approval and aid from the United States until the end of the Cold War in return for his loyalty. However, “his reign produced a constant criticism that Washington was ‘coddling’ a foreign dictator in the name of containment, a charge that was largely valid…the United States allied itself with a military dictatorship in Chile rather than running the risk that the nation would become a beachhead of Marxist revolution” (Hook and Spanier 156-157). The U.S. has a history of allying itself with
notorious regimes during the Cold War because it was often considered more important to contain communism than to condemn human rights abuse.

President Jimmy Carter boasted the centrality of human rights in his policy and indeed his “worldview differed profoundly from those of Richard Nixon and Henry Kissinger.” He emphasized founding his foreign policy on human rights rather than on selfish national interests. (Hook and Spanier 163) But Carter was guilty, as other presidents, of inconsistency. Human rights did not receive the dedication and attention in practice that he claimed. Carter, like so many presidents, advocated and supported human rights only when it suited his political and economic interests:

Carter apparently never appreciated the inconsistency in boldly preaching human rights but practicing business as usual with communist Poland, with the dictatorial and corrupt Philippines, or with reactionary Saudi Arabia. He apparently also never appreciated the inconsistency between preaching universal human rights but practicing rights pressures primarily against relatively weak Latin American states possessing neither valued resources nor perceived geostrategic position. (Forsythe “Human Rights Policy: Change and Continuity” 259)

Thus Carter claimed to be a champion of human rights but his record of inconsistency, such as his reluctance to use economic sanctions against the brutal president of Uganda, Idi Amin, for example, proved otherwise (Forsythe “Human Rights Policy: Change and Continuity” 260). Carter can, however, be credited with improving the annual report on human rights required of the State Department, which up until that time had not been taking the report seriously. Henry Kissinger had blatantly refused to compile and publish a report on the human rights, as required by Congress, in countries that were receiving U.S. security assistance. (260-261) Ronald Reagan, unlike Carter, made no claims to consistency and also made it no secret that “he was going to use human rights as a weapon in the cold war, that he was going to focus his human rights policy on communist
violators, and that friendly authoritarians would not bear the brunt of U.S. human rights policy.” Any anti-communist nation, despite its human rights record, would receive our support, while only communist nations would receive criticism for their records. Reagan believed that dictators who were friendly to the U.S. could be reformed over time “via friendly persuasion and constructive engagement.” Communists, however, “could never reform and thus should be attacked with various weapons, including human rights diplomacy.” (263) As a result, such ‘friendly dictators’ from South Korea and Liberia, with whom Carter had cut off diplomatic ties, were invited to the White House with honor (265).

The end of the Cold War signaled a slight change in U.S. human rights policy as the government had “fewer security concerns to interfere with the pursuit of human rights objectives” (Donnelly 99). Since the containment and eradication of communism no longer completely dominated the agenda, the U.S. had more freedom to support human rights without the constraints it was under during the Cold War. “Washington was willing to make modest but real sacrifices of economic interests, and even accept minor security costs, in order to pursue human rights objectives.” This change in policy could be seen in President George Bush’s treatment of China in response to the Tiananmen square massacre in June 1989: “China, which previously had been largely exempted from U.S. human rights criticism because of its shared enmity toward the Soviet Union, not only came under harsh verbal attack but found itself the subject of significant international sanctions.” (100) China had previously received support and virtually no criticism from the U.S. as it was regarded, during the Cold War, as an ally against the Soviet Union. However, the Tiananmen square massacre, a major violation of human
rights, which up until that time might have gone willingly unnoticed by the U.S., was
criticized. But the administration’s public denunciation of China’s human rights policy
was superficial and meant only to appease an American public intolerant of China’s
actions. Bush sent secret envoys to China after the Tiananmen square incident and
“made clear to the Chinese leadership that [he] was not going to let the massacre upset
shared political and economic interests” (Forsythe “Human Rights Policy: Change and
Continuity” 272). The administration did not want to risk losing political and economic
ties with China over the incident and took measures to appease the Chinese government.
The Bush administration also resisted efforts to press Saddam Hussein about his human
rights policy (Roth 116). There was congressional support for the use of economic levers
and sanctions to pressure Hussein about his notorious record; which included what some
consider the genocidal Anfal campaign against the Kurds. Iraq, however, was regarded
as a strategic buffer against Iran and Bush thus resisted the use of such levers. (Forsythe
“Human Rights Policy: Change and Continuity” 272) Bush later changed his position
when Iraq invaded Kuwait in 1990 and headed the UN coalition in the resulting Gulf War
(273). During the Gulf War Bush demonstrated commitment to the Geneva Conventions
by conducting special tribunals to determine the legal status of some 1000 captured
Iraqis, as is required by the Conventions (Roth 116). The Bush administration also took
action in Somalia; leading the UN humanitarian relief effort (Hook and Spanier 284).
Bush can thus be credited for several real interventions on behalf of human rights, but he
can also be accused of neglecting human rights elsewhere:

In practice there was real support for an improved human rights situation
in places such as Somalia and El Salvador. At one point the Bush
administration recalled the U.S. ambassador in Bulgaria to protest
repression of Turkish Bulgarians. There was also a real lack of support for
an improved human rights situation in places such as Indonesia and Kuwait. (Forsythe “Human Rights Policy: Change and Continuity” 274)

Human rights, therefore, had a serious place on Bush’s agenda as he took leadership and action in several countries on their behalf. However, this commitment was jeopardized by his failure to intervene or condemn human rights abuse in various countries.

Such a contradictory legacy of commitment and neglect can also be attributed to President Bill Clinton. During his campaign for president, Clinton criticized Bush’s human rights policy by claiming that the administration had not given it due attention (Forsythe “Human Rights Policy: Change and Continuity” 275). While in office Clinton made several military interventions on behalf of human rights. He committed troops to quell ethnic violence in Kosovo and returned Haiti’s president, Jean-Bertrand Aristide, to power, ending the campaign of terror of Raoul Cedras (Hook and Spanier 287). The 1994 genocide in Rwanda that resulted in the deaths of up to one million people, however, was deliberately disregarded. Clinton also continued most favored nation status for China despite its human rights record as “China was too important a market, and its regional and global political role too important, for Clinton to sacrifice it on the altar of human rights” (Forsythe “Human Rights Policy: Change and Continuity” 276). He signed the Comprehensive Nuclear Test Ban Treaty in 1996, but would not sign the Ottowa Convention, which called for a worldwide ban on anti-personnel land mines that claimed the lives primarily of civilians in war-torn developing countries (Hook and Spanier 329).

The history of the U.S. government’s human rights policy is also one of exceptionalism. American exceptionalism helps to further explain, beyond the explanation of security, why the U.S. “has been both guilty of…failings [inconsistency,
hypocrisy, arrogance] and also been a driving force behind the promotion and
enforcement of global human rights” (Ignatieff 2). There are three types of American
exceptionalism. The first is what Michael Ignatieff refers to as exemptionalism. This
refers to U.S. noncompliance; that is, its tendency to sign on to international human rights
laws and then exempt itself from them. The U.S., for example, participated in
negotiations for the International Criminal Court (ICC) but exempted its military,
diplomats, and politicians from the possibility of persecution by the court. And while
President Clinton signed the treaty while in office, President George W. Bush has since
unsigned it and negotiated agreements with other nations that would prohibit them from
turning over U.S. nationals to the court. The current Bush administration has continued
to refuse to sign the Ottowa Convention prohibiting anti-personnel land mines because it
wants exemption for its military’s making and deployment of such mines in Korea. (4)
The U.S. also ratified the International Covenant on Civil and Political Rights (ICCPR)
but exempted itself from provisions such as the prohibition on juvenile execution (10).
The second type of American exceptionalism is U.S. denial of “jurisdiction to human
rights law within its own domestic law”; or what Ignatieff refers to as legal isolationism
(8). The U.S. does not formally recognize the authority of international human rights
laws within its own borders, nor does it guarantee its citizens such rights: “In contrast to
all other Western democracies, the United States offers its own citizens no opportunity to
seek remedies for violations of internationally codified rights before either a domestic or
an international tribunal” (Moravcsik 149). The U.S. judicial system also stands apart
from that of many countries in its resistance to using foreign human rights precedents in
its domestic decisions. Lastly, the U.S. is most damagingly characterized by its
maintenance of double standards (Hongju Koh 113). The U.S. judges itself “by more permissive criteria” than the rest of the world and judges its friends more favorably than its enemies (Ignatieef 3). It retains different standards for its own actions, condemning policies in other countries that it itself upholds, and criticizing one country for its human rights record while remaining silent on the record of a friendly nation. For example, during the Iraq war in 2003, “the U.S. demanded proper attention to the Third Geneva Convention of 1949 when its military personnel were missing or were confirmed as captured by the Iraqi side” (Forsythe “U.S. Foreign Policy and Human Rights in an Era of Insecurity” 85). However, the U.S. government has not demonstrated adherence to the Geneva Conventions in its treatment of suspected terrorist detainees. Israel remains relatively free from U.S. condemnation of its human rights violations while Palestine is constantly criticized (Schulz 76-77). “The State Department has regularly criticized regimes in places like Egypt and Pakistan for holding prisoners…in indefinite detention in violation of international due process standards” but retains the right to hold terrorist suspects in such detention (95). The dangers of this last form of American exceptionalism, and the reasons behind it, will be addressed in detail in section three.

Civil Liberties

Civil liberties are usually free from restrictions during times of peace: “It is in times of threat and fear that governments tend to take actions subversive of human rights” (Goldstone 159). Thus, most of the negative effects on civil liberties occur during wartime. “The first major federal restriction on civil liberties, the Alien and Sedition Acts of 1798, were enacted while the federal government was dealing with its first major
military conflict, the undeclared naval war with France” (Graber 95). During the Civil War President Abraham Lincoln suspended habeas corpus without the permission of Congress (Luban “Eight Fallacies about Liberty and Security” 248). He also declared martial law and censored the Copperhead press (Graber 95). During World War I, the Sedition Act of 1918 “forbade Americans to ‘utter, print, or publish disloyal, profane, scurrilous, or abusive language about the form of government, the Constitution, soldiers and sailors, the flag, or uniform of the armed forces…or by word or act oppose the cause of the United States.” As a consequence of this restriction on civil liberties, socialist party leader Eugene Debs was arrested for publicly denouncing U.S. participation in the war and sentenced to twenty-years in federal prison. (Rosati 13) During this time the Wilson administration also “instituted one of the earliest modern and systematic uses of mass communication for propaganda purposes” by creating the Committee on Public Information “to promote the Allied war aims” (12).

The Second World War was a period that witnessed some of the most serious constraints on civil liberties in U.S. history. The government classified over 600,000 Italian citizens as enemy aliens. These citizens “had to face travel restrictions and curfews” and many lost their jobs. Approximately 1,600 were interned and another 10,000 were forced to leave their homes. (Rosati 14) A similar and perhaps worse fate awaited Japanese-Americans. On February 19, 1942, President Franklin Delano Roosevelt signed Executive Order 9066. The Order forced “individuals of Japanese descent living within the continental United States [to] be moved to internment camps in an effort to ensure the internal security of the country.” Japanese-Americans were given only forty-eight hours to prepare for the move. Over 110,000 men, women and children
spent three years in the camps. President Roosevelt’s decision to intern the Japanese was upheld in *Korematsu v. U.S.* in 1944 by the Supreme Court, and is considered “one of the most blatant examples of political repression in American history.” (15) The press was also censored during this time (14).

The perceived menace of communism during the Cold War endangered civil liberties in the wake of World War II. Anticommunist hysteria created an atmosphere of distrust and fear heightened by the persecutions of Senator Joseph McCarthy. The fear of communist subversion was taken as justification for extreme and unconventional measures: “The anticommunist hysteria, or Red Scare II, became so intense, and the demands of national security overwhelmed the demands of democracy so thoroughly, that even defending the constitutional rights and liberties of Americans was considered evidence of disloyalty” (Rosati 16). Restrictions on liberty were deemed necessary to fight the perceived communist threat. During the Cold War lists of hundreds of subversive organizations were kept by the attorney general, who could charge individuals with disloyalty to the United States based on their affiliation with listed organizations. These charges could be made even if one’s membership was not current and was listed during or even before World War II. (17) The CIA also kept names of over 1.5 million individuals on file in addition to “infiltrat[ing] religious, media, and academic groups,” and opening the mail of U.S. citizens (20). Approximately thirty colleges in California, both public and private, had security officers installed on their campuses “to compile information on the political beliefs and affiliations of professors for state officials.” Stanford and the University of California at Berkeley were among the schools that utilized such officers, who were usually former agents of the FBI. (17-18) This period,
characterized by the fear of subversion of communists, can be related to the post-9/11 world in which there exists a similar fear of terrorists. Both periods are distinguished by the existence of fear of an ideological enemy from without and, importantly, within the U.S. The perceived internal threat creates an atmosphere of fear, distrust, and, at times, hysteria. It also provides justification for the expansion of governmental powers and the use of questionable measures taken against alleged communists/terrorists and their sympathizers. These periods are also characterized by government spying, profiling, and the creation of suspect lists.

These examples provide evidence for the danger that civil liberties face during wartime. However, wartime does not always affect civil liberties negatively. Mark Graber argues that “[s]ome civil rights and liberties have historically been unaffected by war” and have even been positively affected by security threats (95). Whether or not liberties face restriction or protection and expansion during both hot and cold wars depends on several factors. For example, civil liberties are likely to face restriction when the potential beneficiaries of a protective rights policy “are ideologically or ethnically identified with America’s enemies or when government officials see the military conflict as an additional reason for advancing existing commitments to further limit the right or liberty in question” (97). Thus, we have seen a negative impact on civil liberties during the war on terror because Muslim-Americans, who are identified with terrorists, would be the main beneficiaries of protective policies. Civil liberties are likely to be expanded and protected, on the other hand, when the potential beneficiaries are identified as loyal to the U.S. or when the “nature of America’s enemies…prompt[s] American leaders to justify such wars…by emphasizing the nation’s inclusive, egalitarian, democratic traditions or,
at least, the national commitment to particular civil rights and liberties”, among others (97). It is important to remember that war does not automatically result in the restriction of liberties. “War throughout American history has not exerted any general, across-the-board pressure to restrict all civil rights and liberties” (99). In fact, there are several instances where liberties have been unchallenged and even advanced during wartime.

The Spanish-American War of 1898 “brought forth the most vigorous dissent to the use of military force in American history” (Graber 109). But despite protest and even attacks on government and military policy, domestic censorship, unlike that enacted during the First and Second World Wars, was almost nonexistent. Edward Atkinson, for example, was not prevented from mailing over 100,000 copies of his anti-imperialist pamphlets domestically. This lack of suppression of dissent can be largely credited, however, to the fact that “[p]ersons not identified ideologically, ethnically, or racially with American enemies were free to protest against military involvements.” Atkinson was white, conservative and protesting a war against Asian enemies and was therefore not subject to censorship. But when the enemy is identified with whites, white critics have been suppressed: such was the situation during the American Revolution and the Civil War. (110)

During World War II women saw their rights expanded as they “were given opportunities to volunteer for military service, business dropped formal and informal bans on women in certain jobs, and the War Labor Board fought to ensure that women who went to work were paid the same as men performing the same tasks.” It must be noted, however, that in the case of women’s rights during this time, some of the liberties they gained were lost once peace was restored. (Graber 102) World War II also saw the
expansion of First Amendment freedoms in the case of Jehovah’s Witnesses and public schools’ mandatory American flag salute. In the case of *West Virginia State Board of Education v. Barnette* (1943), the Supreme Court overturned the *Minersville School Dist. V. Gobitis* (1940) decision in which it was ruled that the mandatory flag salute did not violate the provisions of the First Amendment. The *Gobitis* case involved a Jehovah’s Witness whose religion forbade saluting the flag. (103) The Supreme Court’s decision “was a wartime civil liberties decision, not merely a civil liberties case that happened to be handed down when the United States was at war.” This victory for civil liberties was not a decision that coincidentally coincided with the Second World War. Rather, it was a direct result of the war itself: The flag salute ceremony did not become a national controversy until the late 1930s when it began to be unfavorably compared to the Nazi salute. (105) It was this comparison with the enemy that helped create support for religious liberties:

The Second World War did much to promote religious freedom in general by linking religious bigotry with the Nazi state. Fighting an enemy identified with religious persecution, American leaders highlighted the more religiously inclusive elements of the country’s political and constitutional heritage. (Graber 106)

Thus the enemy can help promote certain rights and liberties when that enemy is identified with their abuse. The Nazis, for example, were notorious for their religious persecution. This prompted the U.S. to emphasize its religious freedom and even expand such rights. Underscoring and improving one’s own contrasting rights is a way to distinguish oneself from one’s enemies.

The Cold War, which was a dangerous time for civil liberties, was also strangely a time for the promotion of racial equality. This was also a result of wartime and not
simply something that happened during the war. In part support for desegregation
stemmed from the government’s desire to increase American popularity overseas. The
Justice Department specifically informed the Supreme Court justices, in the case of
*Brown v. Board of Education* (1954), that “‘racial discrimination in the United States
remains a source of constant embarrassment to this Government in the day-to-day
conduct of its foreign relations.’” The government further denounced Jim Crow, arguing
that it “‘jeopardized the effective maintenance of [American] moral leadership of the free
and democratic nations of the world.’” (Graber 100) The U.S. felt that such a seemingly
backwards domestic civil liberties policy damaged its credibility as a leader of freedom
and rights in the international community. This promotion of rights, inspired by the
government’s desire to improve its image, can also be seen in the defense of procedural
rights that occurred during the Cold War that were inspired by the government’s desire to
project its positive democratic image in contrast to that of totalitarian states. Totalitarian
nations like the Soviet Union were regarded as precisely what the United States did not
stand for. As a result, “policymakers and justices increasingly regarded constitutional
protections for criminal suspects as central to the democratic values that the United States
was championing throughout the globe (108). In the majority opinion for *Ashcroft v.
Tennessee*, in which coerced confessions were declared unconstitutional, Justice Hugo
Black gave a positive comparison of the United States to
certain foreign nations…which convict individuals with testimony
obtained by police organizations possessed of an unrestrained power to
seize persons suspected of crimes against the state, hold them in secret
custody, and wring from them confessions of physical or mental torture.
(Graber 108-109)
Thus, civil liberties were promoted when it was beneficial and favorable to distinguish the ‘good’ and ‘free’ practices of the United States to the repressive policies of totalitarian countries.

Many of the examples given of the positive effects that wartime has on civil liberties also take place during times in which other civil liberties have been restricted. The threats to civil liberties during wartime appear much more prolific than instances in which the government has been inspired to increase protections. The positive examples given are not to suggest that war is always good for rights but rather to demonstrate that we should not come to expect that war will threaten rights:

Critics are right that civil rights and civil liberties have often been limited during war in the name of national security. Restrictive policies, however, are hardly inevitable when war breaks out. No particular civil right or liberty has been restricted whenever the United States has been involved in a hot or cold war (Graber 117)

The tendency to assume that war necessitates a restriction on liberties, that rights must be sacrificed for security, will be further discussed in section four.

II The War on Terror

“[T]he major threat to civil rights and liberties at present is less what happens to civil liberties in wartime than what happens to civil liberties when George Bush is presiding during wartime” (Graber 117-118).

“In its ‘anything goes’ mentality in the fight against terrorism; its inclination to downplay, if not ignore, even the most egregious human rights violations of its allies; its tendency to see terrorists under every turban; its conviction that international covenants mean little and matter less, the Bush administration has done more to damage human rights in its two and a half years in office than the occasional hypocrisy and frequent indifference of nine previous presidents put together. And it was done so largely with the acquiescence of the American people.” (Schulz 105-106)
The war on terror has negatively impacted rights and liberties both domestically and internationally. The Bush administration’s current policy provides evidence that the enhancement of our prioritization of human rights post-Cold War was not because of “their rise in the hierarchy of U.S. foreign policy interests,” but because of “spaces that the demise of anti-communism opened for the pursuit of other objectives” (Donnelly 99). During the Cold War security took precedence over all else, including human rights. The end of the Cold War dramatically reduced U.S. preoccupation with security and thus opened up spaces in which the U.S. could now pursue human rights. The terrorist attacks in New York City have closed up those spaces and we are experiencing a return to Cold War policy where “[n]ational security trumps all” (106). This is why, post-Cold War, the U.S. became a stronger supporter of human rights: “there were fewer security concerns to interfere with the pursuit of human rights” (100). Current U.S. policy thus provides further evidence that the government continues to regard security and rights as antagonistic goals. The Bush administration more readily embraces rights restriction while continuing to uphold the tradition of exceptionalism by employing double standards and continuing to maintain that it is completely committed to human rights. This restriction of rights is evident in multiple spheres: from the government’s increased tolerance for brutal regimes that aid the U.S. in its fight against terrorism to the indefinite detention of terrorist suspects, even those who are U.S. citizens. This is not to imply, however, that the war on terror has had nothing but negative consequences. The threat of global terrorism is something that needs to be addressed and fought. The U.S. has rightly put anti-terrorism on the international agenda. It has undoubtedly improved its counter-terrorism intelligence and capabilities and is more prepared and able to intercept and
prevent terrorist attacks. The Bush administration has also made some genuine efforts to support human rights as in the case of Saad Eddin Ibrahim, which will be discussed in section three. And despite controversy surrounding Bush’s questionable motives for intervening in Iraq, and the criticism the President has received for his management of the war, he did oust Saddam Hussein. Hussein was a brutal dictator guilty of atrocious human rights violations. But these positive effects are overshadowed by the negative implications of the actions of the administration, which are overlooked by the government itself. Bush’s potential for doing good is often being undermined by the negative effects his administration has refused to acknowledge. These implications and dangers will be discussed more extensively in section three. This section serves primarily to demonstrate some of the negative consequences of the war on terror. Furthermore, it is not my belief that the U.S. government is an evil regime that takes pleasure in undermining and violating human rights. Rather, it is acting as it deems necessary to protect the nation. Nor is it my intention to imply that the restriction of rights is never justified and always negative. But while there are times of crisis that necessitate the restriction of rights and enhancement of governmental powers, the Bush administration has gone too far. Bush adheres to the fallacy that rights must be sacrificed in the name of security. It is its misguided belief in this fallacy that is causing it to have such a negative impact on the world. This will be further examined in the fourth section.

*Human Rights*

Perhaps the most infamous case of U.S. disregard for human rights is its reluctance to implement international human rights law in the case of unlawful or enemy
combatants and the Geneva Conventions. The U.S. has determined that the Geneva
Conventions, international laws of armed conflict, do not apply to certain detainees.
President Bush has declared that al Qaeda and Taliban detainees are “unlawful
combatants and, therefore, do not qualify as prisoners of war” (“Humane Treatment of al
Qaeda and Taliban Detainees”). According to this reasoning, al Qaeda and the Taliban
prisoners are not traditional uniformed soldiers or members of States - which qualify as
High Contracting Parties to the Geneva Conventions – but something else. The
administration founded its decision to label the prisoners enemy combatants on the 1942
Supreme Court decision *Ex Parte Quirin*. The 1942 case concerned the jurisdiction of
military trials over civilian trials for German saboteurs apprehended in the U.S. The
Court decided that “‘any enemy combatant who without uniform comes secretly through
the lines for the purpose of waging war by destruction of life or property’ would ‘not…be
entitled to the status of prisoner of war, but…be [an] offender[] against the law of war
subject to trial and punishment by military tribunals.’” It is important to note that the
Court determined *where* such an offender was to be tried and not, as the Bush
administration has determined, *whether* he was to be tried at all. (Luban “The War on
Terrorism and the End of Human Rights” 223) The Court’s 1942 decision did not decide
whether or not ‘enemy combatants’ had the right to a trial but only in which court they
were to be tried. This is drastically less alarming than Bush’s determination that
combatants do not even have the right to trial in the first place. Denying trial completely
is much more serious than denying trial by only a certain type of court.

Approximately 505 men continue to be held in indefinite detention in
Guantanamo Bay. The Bush administration has denied these so-called enemy
combatants many basic rights, importantly their rights to due process. The Geneva Conventions contain provisions to protect those whose status is undetermined. Article 45 of Protocol I to Geneva states that “[s]hould any doubt arise as to whether any such person is entitled to the status of prisoner of war [POW], he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.” This is why it is important to note that the U.S. is dismissing Geneva altogether rather than simply denying detainees POW status: Geneva protects those of questionable status. By denying the jurisdiction of Geneva, the U.S. would not have to hold these special tribunals. It would also diminish potential accusations that the U.S. was violating international law.

As Alberto R. Gonzales counseled the President in 2002, “determination that GPW [Geneva Conventions] does not apply to al Qaeda and the Taliban eliminates any argument regarding the need for case-by-case determinations of POW status”, and “substantially reduces the threat of domestic criminal prosecution” (Gonzales). This refusal to hold special tribunals to determine POW status for detainees is also an example of the contradiction and hypocrisy in U.S. policy: during the 1991 Gulf War, the U.S. military held special tribunals to determine the legal status of over 1000 captured Iraqis in accordance with the Geneva Conventions (Roth 116).

The denial of POW status and of the application of the Geneva Conventions has serious implications. First, detainees are held secretly and indefinitely without the right to challenge their detention. Detainees held as POWs, however, would only be obligated to give name, rank, birth date, and serial number…; would have to be ‘quartered under conditions favorable as those for the forces of the Detaining Power who are billeted in the same
area’; could not be prosecuted merely for participating in hostilities…; and would need to be released at the ‘cessation of hostilities.’” (Schulz 92)

The 1942 Supreme Court decision that the administration has based its application and use of the term enemy combatant on “did not authorize open-ended confinement; it only established that [enemy combatants] were subject to ‘trial and punishment by military tribunals’ rather than civilian courts.” Furthermore, *Ex Parte Quirin* was decided years before the creation and adoption of the Universal Declaration of Human Rights and other international protocols for due process. (Schulz 96) In November of 2001, President Bush did create military commissions to hear cases against alleged terrorists. However, these tribunals are extremely unjust and biased. “The president or the secretary of defense will alone decide who will sit on the commission and who will be tried before them.” The defendant and his lawyer can be excluded from what the defense secretary or the presiding officer deem to be sensitive and classified portions of the trial. The verdicts, which include the death penalty, cannot be appealed to a civilian court. Instead, they can only be appealed to a review panel that is appointed by the secretary of defense and whose final decision is made by the president. “This means that an individual can be executed…after a trial from crucial portions of which he was excluded and without appeal to any independent authority.” (97) Secretary of Defense Donald Rumsfeld has maintained, however, that the U.S. may continue to detain prisoners even if they are acquitted by military tribunals (Luban “The War on Terrorism and the End of Human Rights” 222). The government has also not remained consistent in its decision concerning enemy combatants. These military tribunals were intended for non-U.S. citizens, but non-U.S. citizen Zacarias Moussaoui, the so-called 20th hijacker, is being tried in civilian court (Schulz 98).
Several important cases concerning the detention of terrorist suspects have come before the Supreme Court. None of the decisions made, however, have satisfactorily confronted the executive’s claim to indefinite detention or its labeling of enemy combatants. In *Rasul v. Bush* (2004), the Supreme Court decided that non-U.S. citizen detainees have the right to challenge their detention U.S. Court. The Court did not, however, consider whether or not their detention was in fact legal. (Tushnet 249) The June 28, 2004 case *Rumsfeld v. Padilla* concerned the detention of U.S. citizens. Jose Padilla was a U.S. citizen classified as an unlawful combatant and filed suit to challenge his detention. The Supreme Court, however, did not rule on the issue at hand but rather decided that Padilla’s habeas corpus petition had been filed in the wrong place. (250) Yaser Hamdi was also a U.S. citizen who was designated an unlawful combatant. In *Hamdi v. Rumsfeld* (2004) he “claimed that his detention violated a federal statute enacted in 1971 to avoid a repetition of the Japanese internment…The statute says that ‘[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.’” The government argued that the September 18, 2001 congressional resolution authorizing “the use of military force ‘against those nations, organizations, or persons’ who ‘planned, authorized, committee or aided the terrorist attacks’ of September 11, or ‘harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons’” met the requirements. It also made the claim that the president, as commander in chief, had the inherent authority to detain Hamdi. The Supreme Court ruled in favor of the government, declaring that the September 2001 resolution satisfied the requirements of the 1971 federal statute. It also ruled, however,
that Hamdi and other U.S. citizens being held as enemy combatants had the right to challenge their detention before an impartial judge. (251) And just last year, in March 2005, the Pentagon completed “a one-time administrative review of each detainee at Guantanamo to determine whether he should be considered an ‘enemy combatant.’” However, this administrative review is unjust and biased in favor of the government’s designation:

The proceedings were stacked against the detainees: they were presumed to be enemy combatants, were denied the assistance of counsel, were not able to bring in outside witnesses, and were not able to see all of the evidence against them. All but thirty-eight of the detainees were deemed enemy combatants. (“Human Rights Overview: United States”)

The administration has only made superficial gestures towards granting these detainees effective rights. This administrative review, and the President’s military tribunals, do not give the detainees any protection from the subjectivity of the government. The nine detainees that have been charged with crimes were going to be tried by military commission but the commissions have been halted until the Supreme Court decides their legality. (“Human Rights Overview: United States”)

In its treatment of detainees, the Bush administration has upheld the tradition of American exceptionalism. It continues to judge its own actions by different standards than it judges other countries. Though it retains the right to hold prisoners in indefinite detention without the right to challenge their detention, the “State Department has regularly criticized regimes in places like Egypt and Pakistan for holding prisoners…in indefinite detention in violation of international due process standards” (Schulz 95). The government’s creation of military tribunals to hear the cases against alleged terrorists also promotes the use of double standards as it “has regularly condemned countries that
utilized military tribunals, rather than civilian courts, to try those accused of terrorist crimes, such as Peru…or Nigeria” (97). Finally, as aforementioned, during the Iraq war in 2003, “the U.S. demanded proper attention to the Third Geneva Convention of 1949 when its military personnel were missing or were confirmed as capture by the Iraqi side” (Forsythe “U.S. Foreign Policy and Human Rights in an Era of Insecurity” 85). These are just some examples of Bush’s employment of double standards. The administration judges itself differently from the rest of the world, and will criticize other nation for actions it has itself committed.

The second serious consequence of the denial of prisoner of war status and of the application of the Geneva Conventions is manifested in the torture controversy. In May 2004, the Wall Street Journal published excerpts from a confidential January report by the International Committee of the Red Cross (ICRC) that documented “a number of serious violations of International Humanitarian Law” (International Committee of the Red Cross 3). The ICRC found that in almost all of their documented instances “arresting authorities provided no information about who they were, where their base was located, nor did they explain the cause of arrest,” and “they rarely informed the arrestee or his family where he was being taken and for how long, resulting in the de facto ‘disappearance’ of the arrestee” (8). This is in clear violation of the Third Geneva Convention, which in Article 70 states that “[i]mmEDIATELY UPON CAPTURE, OR NOT MORE THAN ONE WEEK AFTER ARRIVAL…EVERY PRISONER OF WAR SHALL BE ENABLED TO WRITE DIRECT TO HIS FAMILY.” Of course, however, the Bush administration maintains that these detainees are not, in fact, prisoners of war, and thus denied such rights. The more serious allegations regard the physical maltreatment of prisoners. Prisoners of war and other persons
protected by the Geneva Conventions are guarded against acts of violence, intimidation, threats, and insults by Articles 13, 14, 17, 87 of the Third Geneva Convention, and Articles 5, 27, 31, 32, 33 of the Fourth Geneva Convention. The ICRC documented several cases where prisoners were abused during transfer and interrogation. One man, a “High Value Detainee,” was “hooded, handcuffed in the back, and made to lie face down, on a hot surface during transportation.” As a result he suffered severe burns and “had to undergo several skin grafts, amputation of his right index finger, and suffered the permanent loss of the use of his left fifth finger.” (10)

Most disturbing was the ICRC’s findings of methods of ill-treatment alleged during interrogation. The ICRC reported that the methods “were used by the military intelligence in a systematic way to gain confessions and extract information or other forms of co-operation from persons who have been arrested in connection with suspected security offences or deemed to have an ‘intelligence value’”, and were “tantamount to torture” (International Committee of the Red Cross 12, 4). Aside from being in clear violation of Articles which dictate that prisoners and other protected persons “must at all times be humanely treated”, Article 17 of the Third Geneva Convention explicitly prohibits such interrogation methods: “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever.”

The U.S. government has responded to such allegations of violations of international law by placing the blame on a few ‘bad apples.’ However, according to Human Rights Watch, “this pattern of abuse did not result from the acts of individual soldiers who broke the rules,” but from “decisions made by the Bush administration to
bend, ignore, or cast rules aside” (“The Road to Abu Ghraib”). This implies that the ill-treatment suffered by detainees was the result of a deliberate government policy and not the actions of independently acting soldiers. Thus, Abu Ghraib is another example of the Bush administration’s willingness to restrict rights as it deems necessary for security.

The Third and Fourth Geneva Conventions, the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment, all of which the United States has ratified, and the Fourth, Fifth, and Eighth Amendments to the U.S. Constitution among others prohibit the use of torture and detail treatment of detainees. In accordance with these documents the U.S. does not promote a policy of torture. But just what constitutes torture is not explicitly defined in the aforementioned laws. The Convention Against Torture defines it as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” (Article 1). Current U.S. policy does not essentially violate said laws as it employs its own definition of torture and uses selectivity in the application of the Geneva Conventions to detainees. The Bush administration has also asserted that the Convention Against Torture does not apply to its personnel overseas (“U.S. ‘shifts’ position on torture”).

The Office of Legal Counsel (OLC) determined that “torture is not the mere infliction of pain or suffering.” In order for an act to constitute torture, “[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.” (Bybee 13) The practice of waterboarding, however, was defended by the CIA. This
technique, in which the prisoner is submerged in water and made to believe he will
drown, has been used by the CIA. Despite clearly violating even the U.S.’s strict
definition of torture, which includes the “threat of imminent death”, the practice is
defended by CIA Director Porter J. Gross as “an area of what I will call professional
interrogation techniques.” (Jehl) However, the Conventions also guard protected persons
against physical/moral coercion, acts of violence, intimidation, threats, and insults by
Articles 13, 14, 17, 87 of the Third Geneva Convention, and Articles 5, 27, 31, 32, 33 of
the Fourth Geneva Convention. These articles encompass the less extreme forms of
violence not included in the OLC’s narrow definition.

The U.S. has further determined that “even if an interrogation method arguably
were to violate…the statute would be unconstitutional if it impermissibly encroached on
the President’s constitutional power to conduct a military campaign” (Bybee 31). The
President is the Commander-in-Chief and as such “has the constitutional authority to
order interrogations of enemy combatants to gain intelligence information concerning the
military plans of the enemy” (31). The President of the United States is above the law,
domestic and international, when it comes to matters of security. He is assumed to have
the authority to do whatever is necessary to defeat the enemy. But the supposition that
the war on terror “is a new paradigm” which “requires new thinking in the law of war,”
and that the President has the authority to suspend international law if it is in the interests
of national security is challenged by Article 2 of the Torture Convention: “[n]o
exceptional circumstances whatsoever, whether a state of war or a threat or, internal
political instability or any other public emergency, may be involved as a justification of
torture” (Bush “Humane Treatment of al Qaeda and Taliban Detainees”). This provision
clearly prohibits the President’s supposed “complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces” (Bybee 33). This article challenges the assertion that the President of the U.S. can suspend international law in the interests of national security, no matter how exceptional the circumstance.

In the past year, however, the administration has begun to appear to change its stance on torture and cruel, inhuman, degrading punishment. In November of 2005, President Bush, amid rising controversy over the government’s policy towards torture, publicly defended the treatment of detainees, stating: “We do not torture and therefore we’re working with Congress to make sure that as we go forward, we make it more possible to do our job” (qtd. in “U.S. does not torture, Bush insists”). This past November, U.S. Secretary of State Condoleeza Rice affirmed that the U.S. would abide by international law: “We have always respected our international legal obligations and we have led the world in developing new international law” (qtd. in The Associated Press). Rice also stated in December 2005 that the U.S. would be bound by the Convention Against Torture both inside and outside of the country (“U.S. ‘shifts’ position on torture”). President Bush accepted and signed Senator John McCain’s proposed Detainee Amendment, which would effectively ban torture, on December 15, 2005. (“U.S: Landmark Torture Ban Undercut”) These seeming advancements for human rights, however, have been severely undercut by other recent actions of the administration and the government and controversies that have arisen.

Bush’s proclamation that the U.S. does not torture came in response to allegations from the Washington Post that the CIA has been running secret jails in Eastern Europe
(“U.S. does not torture, Bush insists”). Senator McCain’s Amendment did not win the favor of the administration easily. Vice President Dick Cheney fiercely opposed the Amendment and sought to exempt the CIA from the legislation. Furthermore, the torture ban includes a provision called the Graham-Levin Amendment which would “deny the five hundred-some detainees in Guantanamo Bay the ability to bring legal action seeking relief from the use of torture or cruel and inhumane treatment” (“U.S: Landmark Torture Ban Undercut). The original McCain Amendment already restricted the ability of Guantanamo detainees to seek legal recourse, and the Graham-Levin Amendment restricts it even further:

The language in the original Senate version already placed new and significant restrictions on Guantánamo Bay detainees’ access to federal court. It eliminated the right for detainees to bring habeas corpus claims challenging the legality of their ongoing detention and asserting their innocence. Instead, detainees would be allowed to seek independent court review of their detention at just two points in time – after their initial designation as an enemy combatant by a Combatant Status Review Tribunal and after conviction by a military commission – and would be allowed to raise only a very narrow set of claims. They could challenge the procedures and constitutionality of the tribunals and commissions, but would be precluded from seeking an independent review of the factual basis for their detention or conviction.

The new language would expand the prohibition on habeas review to cover all other claims – making it almost impossible for detainees at Guantánamo to seek relief from torture or cruel treatment. (“U.S: Landmark Torture Ban Undercut”)

The Amendment thus severely restricts the due process rights of Guantanamo Bay detainees. It would also implicitly authorize the use of evidence obtained through torture; “the first time in American history that Congress has effectively permitted the use of evidence obtained through torture.” (“U.S: Landmark Torture Ban Undercut”) And in March 2006, Bush administration lawyers argued that Guantanamo Bay detainees cannot
claim the anti-torture protections of the McCain Amendment. This argument was made in response to a detainee who alleged that he had been tortured. The lawyers have held that the Graham-Levin Amendment “gives Guantanamo Bay detainees access to the courts only to appeal their enemy combatant status determinations and convictions by military commissions” and not to appeal their treatment. (Leonnig and White)

The United States has also become tolerant and supportive of regimes with reputations for human rights abuse in return for their cooperation in the war on terror, as evident in the overnight transformation “of Pakistan…from a retrograde military dictatorship – and one that, in addition, was a major supporter of international terrorism…and a bellicose threat to regional security in south Asia – into a leading U.S. ally” (Donnelly 102). When Pakistan’s General Pervez Musharraf dissolved the country’s elected parliaments and created a military-dominated National Security Council to oversee the civilian government, President Bush was uncritical: “My reaction about President Musharraf, he’s still tight with us on the war against terror, and that’s what I appreciate” (qtd. in Roth 121). Egypt, another important ally in the U.S. war on terror, has been relatively free from criticism for its “lack of democracy, systematic torture, persistent repression, and other violations of human rights” (Forsythe “U.S. Foreign Policy and Human Rights in an Era of Insecurity” 87). In 1992, a ban on aid was imposed on Algeria because of its government’s poor human rights record. Algeria was and is notorious for “egregious abuses in the name of fighting terrorism” and its “security forces have been implicated in the systematic use of torture, forced ‘disappearances,’ arbitrary killings, and extrajudicial executions.” In December 2002, the U.S. government renewed weapons sales and other security assistance to the country. Algeria’s infamous
record was disregarded by the Bush administration, as evident in the words of Assistant Secretary of State William Burns: “Washington has much to learn from Algeria on ways to fight terrorism.” (Lawyers Committee for Human Rights 75) The government should be wary of stating that it has ‘much to learn’ from a country that has committed serious human rights violations in its antiterrorism campaign. Burn’s declaration suggests that the U.S. is not seriously committed to fighting terrorism in a way that is consistent with human rights. Rather than condemning Algeria for its actions, the Bush administration expresses admiration for its efforts. In December of 2001, President Bush embraced the President of Kazakhstan, Nursultan Nazarbayev, whose government continues to torture and abuse its Uighur Muslim minority (Schulz 80). Malaysia is yet another country that the government radically changed its stance on after the war on terror:

Malaysia and its outspokenly anti-Semitic prime minister, Mahathir bin Mohammad, have long been objects of criticism by both private human rights groups and the State Department, but in May 2002 the U.S. attitude toward this enemy of democracy changed markedly when President Bush received him at the White House and was effusive in his praise of Malaysia’s support for antiterrorism efforts. (Schulz 80)

Malaysia, long criticized for its poor human rights record, is now supported by a country that once condemned it. This change in U.S. attitude, as is true for so many notorious regimes, is due to the fact that these countries are cooperative with our antiterrorism efforts.

Saudi Arabia is perhaps the administration’s most infamous ally. Not just our current government but “[o]ne U.S. administration after another has ignored its abysmal human rights practices in order to preserve the flow of reasonably priced oil and maintain military bases in the Middle East” (Schulz 74). The U.S. is and was more concerned with maintaining economic and political ties with what it viewed as an invaluable ally than
with supporting human rights. In Saudi Arabia “[h]undreds have been imprisoned…and dozens executed for such ‘crimes’ as criticizing the government, attempting to practice a minority religion, or belonging to banned organizations such as the Committee for the Defense of Legitimate Rights” (73). Torture and amputations are rampant. The media is strictly censored. Critics are severely punished. Fifteen of the nineteen hijackers of September 11th were raised in Saudi Arabia. Yet despite these and other appalling human rights practices “Saudi Arabia is America’s closest Arab ally.” (74) Thus it is evident that the Bush Administration supports “states notorious for their poor human rights practices” and sacrifices democratic principles in return for their cooperation with our antiterrorism efforts (Hicks 220). “High-level pressure from Washington, if it ever existed, is thus alleviated in exchange for support on anti-terrorism measures” (Forsythe “U.S. Foreign Policy and Human Rights in an Era of Insecurity” 86). The U.S. has, admittedly, spoken out against the practices of many regimes. However, it is much more likely to criticize those that it does not consider central to the war on terror, such as Zimbabwe and Burma, and “has far too often given new found allies a ‘pass’” (Schulz 79).

The Bush administration has further demonstrated its toleration of repression by opposing the New Optional Protocol to the Convention Against Torture “which established a system for inspecting detention facilities where torture is suspected” (Roth 122). Bush opposed the new protocol despite the fact that the U.S. has publicly stated that it does not have a policy of torture and has even ratified the Convention Against Torture. The U.S. could simply not have ratified the protocol as it is, after all, optional. But its “decision, instead, to try to deprive other states of this added human rights
protection stems from an evident desire to avoid strengthening any international human rights law that might even remotely be used to criticize its own conduct” (123). Opposing the protocol rather than simply not ratifying it clearly demonstrates that the administration wants to avoid the advancement of any international human rights law that could be used to criticize its own behavior. It seems apparent, therefore, that the U.S. would only be so strongly opposed to such a protocol if its own conduct was in potential violation of human rights law. Bush also opposed Mexico’s proposed resolution at the 2002 session of the Commission on Human Rights in Geneva “that stressed the importance of fighting terrorism consistent with human rights. The resolution did not condemn any state; it simply reaffirmed an essential principle” (122). Why would the administration be against a resolution that stresses fighting terrorism consistent with human rights if it did not recognize that it does not, in fact, fight terrorism, as it claims, in accordance with human rights standards?

Civil Liberties

The domestic policy of the United States in response to the war on terror has been one that has threatened civil liberties. The most serious example has been the case of U.S. citizens who have been detained as unlawful combatants. As aforementioned in the section on human rights, the Supreme Court has ruled in Hamdi v. Rumsfeld (2004) that Congress’ September 18, 2001 resolution authorizes the detention of unlawful combatants, even those who are U.S. citizens. It also ruled, however, that U.S. citizens cannot be held indefinitely and have the right to basic due process to challenge their detention. (Tushnet 251)
The U.S. government has also enhanced its authority at home in order to combat terrorism and in doing so has restricted our liberties. The USA Patriot Act has come to embody the domestic threat to civil liberties. The Patriot Act was passed just six weeks after the September 11th attacks and “grants unprecedented new surveillance and detention powers to law enforcement and intelligence agencies” (Lawyers Committee for Human Rights 7). It was renewed this past March, 2006. One of the provisions of the Patriot Act “requires libraries, bookstores and other venues to turn over business records, documents, and other items on demand if the FBI has declared that the items are being sought for an ongoing investigation related to international terrorism or clandestine intelligence activities” (16). The Patriot Act “makes it a crime to reveal that the FBI has seized customer records” (17). The FBI was also given the authority to “infiltrate worship services or political gatherings even if there is no demonstrable reason to suspect any criminal activity” (Schulz 103).

The Patriot Act has also been implemented in relative secrecy, challenging existing conventions of open government. For example, “[w]hen Congress attempted to oversee the administration’s use of its new powers, the DOJ [Department of Justice] initially failed to respond to congressional requests for information” (Lawyers Committee for Human Rights 7). In August 2002, the American Civil Liberties Union (ACLU) filed a request to get information about Patriot Act implementation through the Freedom of Information Act. The DOJ said it would comply but failed to release any information by October 2002. In response, the ACLU filed a suit in federal district court. The court ordered the DOJ to comply with the ACLU’s request by January 15, 2004. The DOJ did in fact obey this request, but the 200 plus documents it released were “heavily redacted”
and essentially useless. (7-8) The Department of Homeland Security was exempted from the Freedom of Information Act in 2002 (3). This secrecy is characteristic of the executive branch and not just of the Patriot Act and is extremely dangerous: “[t]he administration’s insistence on secrecy makes effective oversight impossible, upsetting the constitutional system of checks and balances at a time when the executive branch is accruing vast new powers” (1). Secrecy can easily lead to abuse. Why? When acting in secret there can be no oversight or regulation, making it all the more likely that, unchecked, the administration will misuse its power.

One of the most controversial Presidential decisions has been his authorization of the National Security Agency (NSA) to eavesdrop on citizens and non-citizens alike in the U.S. as part of its counter-terrorism effort without the court-approved warrants that are usually required for such domestic spying. The NSA has since monitored the international email and telephone calls of perhaps thousands of people in the U.S. The NSA spying program is a threat to civil liberties and also another example of governmental secrecy. The presidential order that authorized the NSA to eavesdrop was issued secretly in 2002, and was only revealed when the New York Times made the story public in December 2005. President Bush has defended the order as essential to American security and the war on terror and perfectly within the law. Bush has claimed the right to authorize the spying program under the September 2001 Congressional resolution which authorized the military use of force against terrorist groups. (Lichtblau and Risen)

In the wake of 9/11, “[o]rganizations, including charities, that the government suspects of helping terrorists can be closed down based on classified information…that
the organizations and their attorney are not allowed to see” and thus cannot refute. The
government also “maintains a ‘no fly’ list of individuals whom airlines are advised not to allow onto planes.” Just how one gets on this list is unclear. (Schulz 104) It has also recently been disclosed that “Iraqi-Americans and Iraqi citizens in the United States may be electronically monitored, recruited as informants, and could be arrested and detained without charge if government authorities believe the person may be planning domestic terrorist operations.” Even worse, “the details of this program are classified, including whether probable cause must be demonstrated before authorization is granted to monitor an individual.” (Lawyers Committee for Human Rights 42) The government has also created a program called the National Security Entry-Exit Registration System (NSEERS), simply referred to as Special Registration. NSEEERS requires that “men and boys over 16 years of age from 25 countries must report to the INS where they will be photographed, fingerprinted, and interviewed under oath.” Those who do not comply with the INS requirements can be deported. (43)

There are also several laws that the Bush administration has drafted, but never passed, that would impose even more restrictions on civil liberties. Patriot II, for example, would have authorized secret arrests (Lawyers Committee for Human Rights 9). It would also give the executive the power to strip Americans of their citizenship, something that is not easily done as citizenship is considered a safeguard of rights. Americans were traditionally deprived of their citizenship in cases where individuals fought on the side of a nation with which the U.S. was at war. Under Patriot II, you could lose your citizenship if you gave material support to a defined terrorist group. “Citizenship is often described as the fundamental safeguard of all rights,” and giving the
administration greater power to take it from its citizens is dangerous. Furthermore, the executive cannot currently extradite someone for prosecution by another country unless it obtains a treaty or the explicit statutory authority to do so. Patriot II would have overturned this requirement, even for U.S. citizens. (10) Consent decrees that prohibit illegal spying by the police would also be eliminated (11). Patriot II also proposed the creation of a Terrorist Identification Database which “would authorize the administration to collect the DNA of anyone considered a suspect and of any non-citizens deemed to have any form of association with a ‘terrorist organization.’” Failure to comply with the requirements, including surrendering DNA, would be a crime. Those found guilty could be punished with up to a year in prison and a $100,000 fine. (25)

The Department of Justice proposed a program called Operation TIPS which was “designed to encourage citizens to report on the ‘suspicious activities’ of people in their communities” (Lawyers Committee for Human Rights 15). Operation TIPS, however, was turned down by Congress and the final bill that established the Department of Homeland Security specifically banned the operation (16). The Bush administration also proposed the Total Information Awareness (TIA) program: “a comprehensive data-mining project that would tap into, integrate, and extrapolate data from thousands of public and private databases” (16). Not only was TIA a threat to civil liberties, but the “development of TIA began without public notice or a single congressional hearing” and “[n]o oversight or accountability mechanisms were built into TIA or comparable data-mining efforts by the government” (22). Lastly, the “administration’s original draft of the Homeland Security Act effectively exempted DHS [Department of Homeland Security] employees from the protections of the Whistleblower Protection Act.” Senator
Charles Grassley, however, fought to ensure that the Homeland Security Act included those protections. (12)

That these drafts remained as such, and never passed into law, is encouraging. Some of these recommended laws were never even proposed to Congress, and thus were not seriously considered and pushed by the Bush administration. Some of these proposals, such as Operation TIPS, were turned down by Congress and even banned. This demonstrates that the checks and balances, both between the two branches and within the executive branch, are in operation, and thus the American people do have real protection from some of the more extreme measures. However, that the Bush administration suggested some of these provisions at all is a bit alarming and provides further evidence for its willingness to restrict rights and liberties.

III Dangers and Implications

“The world has become a worse place since September 11, and the United States bears some responsibility for the deterioration” (Donnelly 109).

“What the events of 9/11 taught us...is that there can indeed be enormous costs associated with committing or countenancing human rights crimes” (Schulz 67).

Few can and would disagree that human rights and civil liberties have been restricted by this administration as part of its war on terror policy. The previous section documents numerous ways in which rights have been curtailed. Not everyone, however, would agree that this is a cause for concern. For some, the U.S. has been advancing the cause of human rights and the consequences are nothing but positive. The U.S. freed the Iraqi people from the grips of an evil dictator and prevented international law from becoming “a tool of tyrants” (Cushman 101). The invasion of Iraq, just one aspect of the war on
terror, showed human rights abusers around the world that they are no longer going to get away with their disregard for international human rights law simply because the UN is an ineffective institution. The UN proved to be inadequate and the U.S. rightly and justly took much needed action to protect the human rights of the citizens of the world, and in doing so has brought the deficiencies of international law enforcement bodies to light. This will cause the world to think about reforming these institutions. For others, rights have necessarily been restricted in the name of security. The administration’s policy of putting national security first is what rightly needed to be done.

Those who do not believe that there have been any serious consequences as a result of the administration’s policies are neglecting to consider three things: U.S. security, U.S. legitimacy, and U.S. influence. As a result of Bush’s war on terror policy, we as a nation have become less secure both from external and internal threats. The extensive controversy surrounding U.S. treatment of terrorist suspect detainees has threatened U.S. credibility and legitimacy. Without credibility as a human rights leader, the U.S. has lost some of its effectiveness in pressuring other nations to commit to human rights. Lastly, the U.S. is creating opportunities for other states to undermine human rights by providing them with the pretext of antiterrorism.

*We are less secure*

The restrictions placed on human rights and civil liberties are all done in the name of national security. Our rights are being curtailed for our own protection. However, the assumption that rights must necessarily be sacrificed for security is a false one.
Protecting rights, rather, is a necessary condition for protecting us from both the external threat of terrorism and the often overlooked internal threat of the government. Bush and his administration often proclaim that their actions, when potentially threatening human rights, are necessary to combat terrorism. Indefinite detention in violation of the Geneva Conventions is necessary to fight this new threat. Alliance with notorious regimes is necessary because we need their help in fighting the war on terror. The CIA ought to be exempt from McCain’s torture ban so as to not limit its intelligence gathering capabilities. What the administration does not understand is that its failure to abide by international human rights standards and its support of regimes with poor human rights records actually fuels terrorism rather than combats it. As aforementioned, however, this is not to imply that the Bush administration has not done any good. In some ways, America is undoubtedly safer from terrorism than before 9/11. Since the attacks our counterterrorism abilities have certainly been improved. It is also not meant to be implied that there are never times when the restriction of rights is justified. On the contrary, there are times of crisis that necessitate the suspension of certain liberties. These issues will be further discussed in the next section.

Terrorism, though it has numerous manifestations, “almost always [has]…been fueled by violations of human rights” (Schulz 20). Human rights violations can help create and sustain terrorism in a variety of ways. First, many terrorists have experienced human rights abuse first-hand. Second, terrorists need support in order to be successful, and much of that support comes from oppressed and poor populations who don’t feel that the United States is concerned about their plight (23). Respect for human rights can diminish the appeal of extremism and the pool of terrorist recruits (200-202). Our
perceived policy of torture risks breeding even more terrorists: “[a]n anti-terrorism policy that ignores human rights is a gift to terrorists. It reaffirms the violent instrumentalism that breeds terrorism and undermines the public support needed to defeat it” (Roth 128). U.S. treatment of foreigners in the U.S. has been particularly damaging to anti-terrorism. An Iranian student named Hashemi, who was required to report to the Immigration and Naturalization Service (INS), now part of the Department of Homeland Security, to be photographed and fingerprinted, put it best: “students being educated here, like me, are the best potential allies for the United States when we go back to our native countries.” But the typecasting and treatment of people like Hashemi turns their love and respect for the United States into anger and distrust. (Schulz 105) Many Muslims are also of the opinion that the war on terror is really a war against Islam. Such conclusions can be drawn from the administration’s alliances with governments who abuse the rights of Muslims such as the Uighur Muslims in China and Kazakhstan, the Achenese Muslims in Indonesia, and the Muslims in Chechnya. (80-81) Promoting human rights can put lie to this claim. It should not be assumed, however, that commitment to human rights alone will win the war on terrorism. As Amnesty International Executive Director William Schulz states, “Abiding by human rights standards is not sufficient to diminish the threat of terrorism, but it certainly is a necessary condition for achieving that goal” (21). Human rights are just one of many tools that can be used to fight terrorism. They are an important tool nonetheless, and one that many of the other tactics ultimately rely upon:

[V]ictory in the war against terrorism depends upon a myriad of tactics – from tracking down terrorists to disrupting their finances to protecting cyberspace to building a coordinate system of homeland security. It requires a less oil-dependent economy in order that we might be less
reticent to criticize oil-producing states. But it also depends upon nurturing relations with our allies who can supply intelligence and assist with law enforcement. It depends upon cultivating moderate factions within the Islamic community, both at home and abroad, who can counter the influence of radial Islamists. It depends upon addressing the complaints that feed the terrorist retinue – complaints about corruption, poverty, and lack of access to true democracy. It depends upon offering the world a better idea than the terrorists offer. And all these depend upon respect for human rights and the fragile scaffolding that undergrids them” (199-200)

If the Bush administration wants to be successful in its war against terrorism, it must understand how supporting human rights and civil liberties can aid its victory rather than hinder it.

Rights also protect us from the potential internal threat of the abuse and error of the government. Civil liberties “are, specifically, security against the abuses of the government’s police power” (Luban 245). Many of our liberties exist to protect us from the government:

The framers of the Constitution were unsentimental men who knew that government officials will inevitably be tempted to abuse the law to get rich, intimidate their opponents, persecute their enemies, or entrench their own power. They also understood that law enforcement is impatient with the niceties of process; enforcement officials will seek the shortest distance between two points. Furthermore, they understood the arrogance of power – the inevitable tendency of those on top to trust their own judgment and assume their own infallibility. For that reason, our Constitution not only protects our rights; it overprotects them. (245)

For example, as aforementioned in section two, the Bush administration has claimed the authority to designate terrorist suspects, even those who are U.S. citizens, as unlawful combatants and to detain them indefinitely without right to a trial or access to a lawyer. The U.S. Constitution contains protections against such imprisonment, guaranteeing individuals the rights, among others, to habeas corpus and the right to trial. These due process rights protect us from wrongful arrest and the presumption of guilt. The Supreme
Court has confirmed the executive’s power to detain unlawful combatants. It also ruled, however, that U.S. citizens cannot be held indefinitely and have the right to basic due process to challenge their detention. And before the Supreme Court decided otherwise, the administration “argued in federal court that Gitmo is outside US territory, thus federal courts have no jurisdiction and courts no power to intercede” (Schulz 94). Arresting and detaining suspects indefinitely without due process rights may, as the government claims, be protecting us from terrorists – but it is not protecting us from the government.

The dilemma lies in determining where the greater danger lies: in the internal threat of the government or the external threat of terrorists? The answer will differ greatly for different types of groups. Those in power, i.e., the government, will certainly register the terrorist threat as the greater of the two as it is more unlikely for them to feel threatened by themselves. That is, those in power are unlikely to be under threat from the government because they are the government. It is also unlikely for the government to believe it is a threat to its own people because it believes it is in fact acting in the interests of protecting the entire nation. The average American citizen will also most certainly view the terrorist threat as the more dangerous because the average American, that is, a non-Muslim, is not at great risk of being suspected as a terrorist; and thus is unlikely to be in a situation where he or she will need to rely upon those rights, such as due process rights, which have been restricted by the government. Muslims and others stereotypically typecast as terrorists will register the threat of the U.S. government as the more dangerous of the two as they are more likely to be suspected as terrorists and consequently deprived of their rights. In a case such as this the government is often overlooked as a threat, and the external threat is given more credence. This is because
the U.S. is typically regarded by its people as a just and freedom loving nation, while terrorists are more readily identified as evil. The threat of the government is thus more subtle and less overt than the threat of terrorism, which attacks not by secret detention but by bombing. This problematic issue, which contributes to why so many people are willing to give up their rights for alleged security, will be further discussed in section four.

The issue of security v. rights will be addressed more extensively and more explicitly in section four. The purpose of this introductory section was to demonstrate how the restrictions on liberties that the government has imposed have not necessarily made America more secure.

We’ve lost our legitimacy

After the terrorist attacks of September 11, the world was with us. International sympathy and sentiment was manifested in a headline carried by a French newspaper: “We are all Americans.” There was an outpouring of support from around the globe. “Since then, however that noble legacy has been tarnished.” A Pew Global Attitude survey, taken 1.5 years after the attacks, showed that U.S. favorability ratings had plummeted in almost every country that was polled. (Schulz 198). “When the United States now attempts to lecture other governments about human rights, the images that come to mind are the images from Abu Ghraib and the images from Guantanamo” (Neier 141). Instead of being identified with freedom, human rights, and democracy, the America is identified with hypocrisy, torture, and unilateralism. The Bush administration continues, of course, to uphold that the U.S. is a leader of human rights and will work
multilaterally with other nations, but such recent controversies as Abu Ghraib and its insistence on exceptionalism have tarnished that image. The U.S. has suffered a severe blow to its credibility and legitimacy. As a result, America can no longer use state-to-state peer pressure to promote human rights as it once could. State-to-state peer pressure is “one of the most important techniques available to human rights activists.” Now that the U.S. is no longer considered a legitimate leader of human rights, and is viewed as using questionable mechanisms to protect itself, countries with poor human rights records that deal with counterinsurgency feel that they are justified in their abusive repression of rebels because they, ‘like the U.S.’, are simply trying to ‘secure’ their nation: “[g]overnments that were previously criticized of human rights violations that occurred during counterinsurgency campaigns have felt vindicated by the newly permissive attitude towards departures from international human rights standards in the name of security” (Hicks 215). Undoubtedly the U.S. can still use economic pressure, but its other less coercive modes of influence, such as simple shaming techniques and verbal condemnation, have been reduced.

The U.S. has lost its previous level of credibility because of its most dangerous form of exceptionalism: the maintenance of double standards. It has continued the tradition of judging itself differently from the rest of the world. The double standards of the Bush administration may not be any more severe than those of previous administrations, but they are having more serious repercussions as it is conducting a preemptive war of grandiose scale and ideal unparalleled in its history. This is why the U.S. is losing its credibility and damaging its ability to promote human rights unlike any other period. The Bush administration claims to have a policy against torture, but the
images from Abu Ghraib and the administration’s fight to exempt the CIA from the
torture ban suggest otherwise to the rest of the world. Guantanamo detainees were
denied the protections of the Geneva Conventions, yet during the Iraq war in 2003, the
U.S. demanded that Iraqis treat any of its captured personnel in adherence with the Third
Geneva Convention (Forsythe “U.S. Foreign Policy and Human Rights in an Era of
Insecurity” 85). The U.S. also often condemns human rights abuse in Palestine but is
reluctant to criticize abuse committed by Israel. In applying different standards to its
own actions, its friends, and its enemies, the U.S. cannot hope to pressure other nations to
uphold and protect human rights and civil liberties. The U.S. can no longer lead by
example. As William Schulz stated, “[i]t is very difficult to clean another’s face if you
are trying to do so with your own dirty hands” (Schulz 83). When the U.S. allies itself
with abusive regimes, is itself embroiled in controversy, and continues to maintain that it
is above international law, it cannot be effective in its attempts to pressure other countries
to adhere to international human rights standards. Other nations will not take the
pressure seriously.

The U.S., for example, cannot effectively help Israel exist in peace nor serve as a
mediator to the Israeli-Palestinian conflict because it refuses to adequately condemn
Israeli human rights violations:

The United States, often quick to condemn Palestinian violence, reinforces
suspicions of its own motives and makes the work of serving as an honest
broker in the conflict all but impossible when it fails to bring a like
measure of outrage to the mistreatment, maiming, and death meted out to
innocent Palestinians. (Schulz 77)
In Malaysia, the Minister of Justice, Dr. Rais Yatim, commented upon the U.S. government’s previous criticism of the Malaysian Internal Security Act (ISA) for its lack of commitment to human rights:

I believe that after the meeting [with John Ashcroft] there will be no more basis to criticize each other’s systems, specifically the ISA, because if they do that, then the Patriot Act, which is quite similar in nature to the ISA, could come into a position of jeopardy itself (qtd. in Hicks 215).

Yatim is confident that the U.S. cannot criticize its ISA because, as he sees similarities between it and the USA Patriot Act, he believes this would be hypocrisy. According to Yatim, the U.S. doesn’t have the right to pass judgment on Malaysia about the ISA.

Other countries, such as Liberia, have begun to use the term unlawful combatant to silence those critical of the government. On June 24, 2002, an internationally respected journalist named Hassan Bility was arrested and held as an unlawful combatant. Bility had been a vocal critic of Liberian President Charles Taylor’s regime and was held incommunicado in a secret location, without access to a lawyer, where he was torturd. (Lawyers Committee for Human Rights 71-72) The Liberian government justified their actions in the face of criticism by citing the example of the U.S.:

During an interview with an American journalist, the Liberian Minister of Information, Reginald Goodridge, defended the ‘unlawful combatant’ label, saying, ‘It was you guys [the U.S. government] who coined the phrase. We are using the phrase you coined.’ President Taylor also emphasized that Bility was being treated ‘in the same manner in which the U.S. treats terrorists.’ (72)

How can the United States, with a tarnished reputation in regards to its detention of unlawful combatants, hope to appeal to such countries to discontinue this abuse? Eritrea has been arresting independent journalists and human rights and democracy activists:

Girma Asmerom, Eritrea’s Ambassador to the United States, insisted that locking up journalists…is ‘perfectly consistent’ with democratic practice.
As proof of this, according to the *Washington Post*, he ‘cited America’s roundup of material witnesses and suspected aliens.’ (73)

The administration did not even attempt to criticize Eritrea for its actions. When Defense Secretary Donald Rumsfeld visited Eritrea in December of 2002, he was asked to comment about their detainees and responded only that “a country is a sovereign nation and they arrange themselves and deal with their problems in ways that they feel are appropriate to them” (74). Eritrea was exempted from criticism because it has cooperated with the U.S. on its anti-terrorism efforts. In many cases U.S. ability to pressure other states about their human rights records is almost irrelevant because it does not attempt to criticize them at all if they are allies in our war on terror. As mentioned in section two, the U.S. has allied itself with and ignored the human rights records of several notorious governments, such as those of Egypt, Pakistan, and Algeria, in return for their cooperation in the war on terror. How can the U.S. hope to project the image that it is committed to human rights when it is identified with such regimes?

The United States’ deteriorating ability to pressure other governments about human rights is also evident in the case of Saad Eddin Ibrahim. Ibrahim was a prominent and nonviolent democracy activist sentenced to seven years in prison by the Egyptian government in 2002. The Bush administration protested his arrest and sentencing and even threatened to withhold aid to the country. However, what was a genuine active promotion of human rights and “the first time that the United States had conditioned aid on the positive resolution of a human rights case in the Middle East” was largely ineffective because the U.S. has lost credibility as a promoter of human rights in the world. “[I]n light of Washington’s long history of closing its eyes to human rights abuses in the region, and its failure to protest Egypt’s similar persecution of Islamists for
nonviolent political activity, many Egyptians distrusted the administration’s motives.

Even some Egyptian human rights groups denounced the action.” (Roth 125) Because the U.S. had largely ignored Egypt’s human rights violations, while providing it with aid, and did not protest the persecution of Islamists in situations similar to that of Ibrahim, the administration’s protest of Ibrahim’s arrest was ineffective. President Bush’s action did not produce the reaction he might have hoped:

For after turning a blind eye for years to the political repression fostered by the second largest recipient of its military aid, the United States’ sudden interested in the Ibrahim case sparked widespread cynicism. Was it only the professor’s American citizenship that had prompted the president to act? Why had the United States never shown a similar level of concern for other Egyptians? (Schulz 72)

Even Arab intellectuals who promote democracy and human rights have felt the need to distance themselves from the United States:

From the standpoint of the Arab intellectuals, they feel they have to separate themselves from the United States policy in order to have credibility in their region. So, when the United States speaks in the name of democracy and human rights in justifying its policy in the Middle East, Arab intellectuals who are themselves committed to democracy and human rights run away as fast as they can. It tarnishes their effort. That is, I believe, one of the consequences of American military policy that is proving very destructive. (Neier 139)

That Arab intellectuals must dissociate themselves from the United States if they want to successfully promote democracy and human rights further demonstrates how the U.S. has lost its legitimacy. Losing credibility in this region, as was discussed earlier, is particularly damaging to the U.S. in its war on terror as it does not help diminish the terrorist appeal.

_We’re encouraging other nations to undermine human rights_
The war on terror gives other nations the opportunity to violate human rights by providing them with the ready-made excuse of restricting liberties in the name of antiterrorism. The Bush administration, as we have seen, has negatively impacted human rights and civil liberties as part of its war on terrorism. This has harmful consequences for those within the U.S. and those being held in its detention facilities, but it also has harmful consequences for the people of other nations that are following our lead in how to combat terrorism. The war on terror “is not the code name of a discreet, neatly boxed American operation – it has become a model of politics, a worldview with its own distinctive premises and consequences” (Luban “The War on Terrorism and the End of Human Rights”). Thus, the war on terror is not a simple American military operation but a paradigm of government with international repercussions. Our government’s response to terrorism has become a model that other nations are following: “Nations around the world have had to grapple with difficult questions of national security in the wake of September 11. In determining how to respond, many governments have followed the U.S. lead, adopting expansive new anti-terrorism laws and practices “(Lawyers Committee for Human Rights 77). Therefore, the policy of the Bush administration carries international consequences:

There is a widespread belief among human rights activists in many parts of the world that the U.S. disregard for international human rights principles has set a negative global pattern. The arguments for this view are compelling. The views and actions of the United States carry great influence in all parts of the world. Moreover, the United States has been a leading member of the contemporary international human rights system from its inception in 1948…Therefore, it is only natural that governments around the world should look closely at U.S. practice and rhetoric as a guide to their own compliance with international standards. (Hicks 218)
The U.S. is setting an example for the world. As a result of being world’s arguably only remaining superpower, and as a nation with a history of human rights leadership, many countries follow the U.S. lead in how to comply with international human rights law and currently with how to combat terrorism. The U.S. thus has a unique responsibility to provide a positive example for others to follow.

Just as some nations have simply followed our lead, “[o]ther governments have seized upon the rhetoric of the ‘war on terrorism’ to justify their own repressive policies – insisting that domestic opponents pose a similar terrorist threat” (Lawyers Committee for Human Rights 77). In Russia, for example, “the government’s brutal tactics in Chechnya had become a target of growing national and international criticism by 2001. After September 11, the Russian government has increasingly sought to justify its harsh military actions in Chechnya as a response to the Chechens’ ties to al-Qaeda and global Islamic terrorism” (Hicks 215). This logic is also reflected in the words of former President of Georgia, Eduard Shevardnadze: “international human rights commitments might become pale in comparison with the importance of the anti-terrorist campaign” (qtd. in Hicks 216). The U.S. has also sought the assistance of China against terrorism, and China uses this to their advantage as an excuse to fight their own ‘terrorism’ and separatism “which is Chinese code language for those who, usually nonviolently, seek independence for Tibet and the Muslim province of Xinjiang.” Indonesia has also used the terrorism excuse in its “abusive crackdown” on Aceh and Irian Jaya. (Schulz 79). And as aforementioned, the administration’s application of the term unlawful combatant has been utilized by other governments such as Liberia. Eritrea began arresting journalists and human rights activists. In defending their practices, both countries have
cited U.S. actions. “More and more countries” like Tanzania, Indonesia, and Israel “are adopting harsh new emergency laws, with explicit reference to the current climate of no-holds barred anti-terrorism” (Lawyers Committee for Human Rights 76).

The Bush administration’s policy should be one that encourages other nations to commit to human rights, not to undermine them. Furthermore, its ongoing claim that the U.S. continues to be the world’s leader when it comes to human rights and freedom is perhaps more damaging than its restriction of rights and disregard for international law. In this way the U.S. gives nations an excuse to neglect rights under the guise of the supposedly more noble cause of antiterrorism. However, a “successful anti-terrorism policy must endeavor to build strong international norms and institutions on human rights, not provide a new rationale for avoiding and undermining them” (Roth 128). Human rights can be a powerful tool to help combat terrorism. The government, however, is giving the world new reasons to subvert international human rights law and validation for not respecting those norms. It should instead be encouraging other nations to adhere to these laws. The Bush administration has based its policy on the false notion that rights and security are incompatible and in doing so has given the world a dangerous justification for achieving security at all the wrong costs.

IV Security v. Human Rights

That Americans are so willing to sacrifice their rights and those of others around the world reflects both the fear our leaders have instilled in us...and the failure of those of us who support human rights to explain adequately how protecting them, both at home and abroad, actually makes terrorism less likely to succeed rather than more. (Schulz 8)
Kofi Annan: “Respect of human rights, fundamental freedoms, and the rule of law are essential tools in the effort to combat terrorism – not privileges to be sacrificed at a time of tension” (qtd. in Hicks 221),

Aharon Barak: “Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.” (qtd. in Goldstone 164)

The U.S. has become a less safe place for rights and liberties since 9/11. The war on terror, the Bush administration believes, necessitates the restriction of human rights and civil liberties. Only through such limitation can the U.S. successfully fight its war and achieve security for the nation and the entire world. However, as we have seen, both the U.S. and the world have not benefited from this antiterrorism policy as completely as some would believe. The people of the United States are less secure from both internal and external threats and several notorious regimes around the world can pursue their abuse of human rights under the guise of fighting terror and with the support of the United States. Liberties have been restricted and the purposes for which the government has done so, security and combating terrorism, have not been successfully accomplished as a result of the administration’s policy. And perhaps worst of all, this policy is based on a fallacy: that rights and security are antagonistic goals. Human rights and civil liberties are not a hindrance to security but are rather essential to it. This section will examine the supposed incompatibility of rights and security. First I will explore why rights and security are so commonly viewed as antagonistic goals. Security and rights are often believed to be antagonistic because of prevailing notions of the state of exception. Second, I will demonstrate how the Bush administration fundamentally adheres to this notion. Finally, I will examine the two dangerous consequences of this adherence.
Bush’s war on terror is not a traditional war and poses numerous threats due to its extraordinary scope, duration, and utilization of the hybrid war-law model. And while numerous other administrations are guilty of curtailing civil liberties and damaging the human rights cause during hot and cold wars, this does not justify the actions of the Bush administration. Rights do not necessarily need to be sacrificed for the sake of security. Rather, they are essential to it.

*The State of Exception*

The Bush administration, and the American people, have come to regard security and rights as at odds with one another: the result of this being that the U.S. is increasingly willing to compromise human rights and civil liberties for the sake of security. But why are human rights and security so often regarded as incompatible? Because of the state of exception. A time of extreme danger or crisis, such as wartime, is traditionally thought to necessitate the suspension of the constitution and rule of law in order to protect the republic (Hardt and Negri 7). A crisis such as wartime is an emergency that requires the restriction of liberty and the enhancement of the powers of the government. Without this restriction and enhancement the government supposedly cannot be effective in protecting the people. Emergencies require quick and decisive action, action that can be constrained by civil liberties. Civil liberties such as due process rights can delay governmental action. They take time. That is precisely what they were meant to do: such elongation of process protects citizens from the error and abuse of the government. However, what we may regard as protections are often regarded as constraints by the government. The right to habeas corpus, for example, hinders the government’s ability to swiftly and effectively
round up suspected terrorists. Allowing every prisoner to challenge the legality of their imprisonment will, debatably, waste valuable time. Law enforcement officials are often “impatient with [such] niceties of process” and “will seek the shortest distance between two points” (Luban “Eight Fallacies About Liberty and Security” 245). To give a simple, theoretical example, imagine if there had been a gun massacre in a small town. The police, not knowing if there would be another attack at any moment, need to act quickly to protect the town. They decide that the most effective action is to confiscate all such weaponry immediately until they can determine the identity of the perpetrator(s). Thus, warrant rights and the right to bear arms become obstacles that prevent the police from acting swiftly and effectively to protect the people. This is, of course, not the most realistic and unproblematic of examples, but it serves to demonstrate an important point: times of crisis arguably cannot accommodate these ‘niceties.’

Eric Posner and Adrian Vermuele call this the accommodation view. They claim that there are two views about the proper role of the constitution during national emergencies. The first view, or the accommodation view, holds that the constitution should be relaxed or suspended during times of emergency, that is, states of exception. Power should be concentrated and “[c]onstitutional rights should be relaxed, so that the executive can move forcefully against the threat.” This view differentiates between times of emergency and times of normalcy for which there are different and appropriate constitutional rights. Finally, while the accommodation view recognizes that there are risks inherent in expanding the power of the executive, it believes that such risks are justified by security benefits. (Posner and Vermeule 55). The second or “strict” view argues that the constitution should not be relaxed during wartime precisely because the
executive’s powers will be enhanced. It does not believe that the risks are justified by security benefits. (57)

*Bush’s State of Exception*

It is argued that events of 9/11 provide evidence that the enhancement of our prioritization of human rights post-Cold War was not because of “their rise in the hierarchy of U.S. foreign policy interests” but because of diminished security concerns that created spaces for the pursuit of human rights objectives (Donnelly 99). That is, security was no longer a top priority that superseded human rights. With the communist threat in decline, other things like human rights could be pursued. But the terrorist attacks in New York City have closed up those spaces, and we are experiencing a return to Cold War policy, where “[n]ational security trumps all” (106). The U.S. has always been willing to compromise rights, and this is evident in our return to a Cold War policy when the government was similarly willing to support abusive regimes so long as they were our allies and liberty was sacrificed in the name of security. The Bush administration thus adheres to the model of the state of exception and the accommodation view. It believes that America is in a time of crisis and emergency during which rights must be restricted so that the executive can move forcefully and effectively against terrorism.

This belief, that rights are a hindrance to security, is evident in the Bush administration’s defense and justification of many of its restrictive actions and other public statements. In his December 17, 2005 radio address, President Bush defended his controversial NSA spying program by arguing that it “is crucial to our national security”,

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“is a vital tool in our war against the terrorists” and “is critical to saving American lives.” Bush also defended the Patriot Act, which at the time was set to expire: “The Patriot Act has accomplished exactly what it was designed to do: it has protected American liberty and saved American lives.” Bush continued by remarking that the Patriot Act was set to expire in a few weeks but that the terrorist threat to America would not expire in that time. (Bush “President’s Radio Address) Thus, the Patriot Act and the NSA wiretapping program, controversial measures that have resulted in a restriction of liberty, are justified because they are ‘crucial to our national security.’ In its 2006 Quadrennial Defense Review Report, the Defense Department lists “[i]increasing the freedom of action of the United States and its allies and partners in meeting the security challenges of the 21st century” as “critically important” (2-3). What is it that is constraining this freedom of action? International and domestic human rights law. Secretary of State Condoleezza Rice also used the language of constraint. In November 2005 Rice stated that the administration was protecting the American people “within the constraint of the Constitution” (qtd. in Associated Press). It is evident in such language that the administration regards the Constitution as a hindrance that limits their action and ability to protect America. In fact, so entrenched is the administration’s belief that security and rights are antagonistic goals that even those who criticize the administration’s policy are condemned by the government: “Human rights defenders who speak out against repression as a response to the threat of terrorism have themselves been subjected to attack for their criticisms” (Hicks 210). Former Attorney General John Ashcroft, testifying before Senate Judiciary Committee in December 2001, demonstrates this attitude: “To those who scare peace-loving people with phantoms of lost liberty, my
message is this: Your tactics only aid terrorists for they erode our national unity and diminish our resolves...They give ammunition to America’s enemies and pause to America’s friends. They encourage people of good will to remain silent in the face of evil” (211). Ashcroft’s words provide evidence that the Bush administration does not accept criticism of its actions. Even those who express concerns about the negative impact the war on terror has had on human rights and civil liberties, and question the necessity of such restrictions, are attacked for their denunciation. They are even accused of helping the terrorists. There is little room for opposition to Bush’s policy, and thus little room to attempt to show the administration how protecting and supporting rights can actually help it fight its war on terror.

It is thus clear that the Bush administration adheres to the state of exception model and believes that rights have been justly and necessarily subordinate to security concerns. But so what? Isn’t the government simply trying to protect us, and aren’t these measures necessary? Undoubtedly many other administrations would have acted similarly:

> the severity, shock, and fears associated with the attacks would have induced any American leadership immediately to put the security of the society at the center of its political agenda, and by so doing, diminish the attention and priority accorded to the protection of international human rights as matters of national policy (Falk 230).

We have seen numerous examples in the past where other administrations have likewise been guilty of restricting rights during times of war. Lincoln suspended habeas corpus. Franklin D. Roosevelt signed the now infamous order that interned the Japanese. There are two flaws with this line of reasoning. The first is that the war on terror has far more serious implications and dangers than, for example, the Cold War. The second is that
while Lincoln and Roosevelt may have restricted rights, this does not justify the actions of this administration. Rights are not always curtailed in the face of war nor do they have to be. The Bush administration’s policy is based on the fallacy that rights are a hindrance to rather than a benefactor of achieving security against terrorism.

*The Global Long War on Terror*

The war on terror and its impact on human rights and civil liberties is much more alarming than the Cold War era or any other hot or cold war in American history. The September 11 terrorist attacks have “opened a new era of war” (Hardt and Negri 4). “The old-fashioned war against a nation-state was clearly defined spatially, even if it could at times spread to other countries, and the end of such a war was generally marked by the surrender, victory, or truce between the conflicting states.” The ‘new war’ on terrorism has rendered these traditional spatial and temporal limits of war indeterminate: “when U.S. leaders announced the ‘war against terrorism’ they emphasized that it would have to extend throughout the world and continue for an indefinite period.” (14) This is evident in the executive’s 2002 National Security Strategy in which President Bush stated that “[t]he war against terrorists of global reach is a global enterprise of uncertain duration” (qtd. in The National Security Strategy of the United States of America 2002). The administration has also recently begun to use the term ‘the long war’ in reference to the war on terror. This is even more alarming than the notion of a war on terrorism which “does not (any more than the concept of evil) provide a solid conceptual or political anchor for the contemporary global state of war” (Hardt and Negri 16). Waging a war against terror is waging a war not against a defined and bounded nation-state but against
a concept. It is “[a] war to create and maintain social order.” But unlike other metaphorical wars, like the war on poverty, the war on terror is much more dangerous and has more serious implications because it is also like traditional war: “like war traditionally conceived they involve armed combat and lethal force.” (14) As William Schulz noted, “[e]ven Ronald Reagan had limited the evil with which he was determined to do away to a single empire” and “not since Democratic Woodrow Wilson had a U.S. president taken on such a grandiose ideal” (Schulz 58).

In addition, unlike in traditional wars, the goal or end of the war on terror is not capitulation. Rather, the administration’s war on terrorism will not end until it has either killed or captured every single terrorist:

In traditional wars among the states the war aim is, as Clausewitz argued, to impose one state’s political will on another’s. The aim of the war is not to kill the enemy – killing the enemy is the means used to achieve the real end, which is to force capitulation. In the war on terrorism, no capitulation is possible. That means that the real aim of the war is, quite simply, to kill or capture all of the terrorists – to keep on killing and killing, capturing and capturing, until they are all gone. (Luban “The War on Terrorism and the End of Human Rights” 228)

This is why the war on terror is of ‘uncertain duration’: because the terms of victory have changed. The term ‘long war’ further reinforces the Bush administration’s position that this will be a war with no foreseeable end. The ‘long war’ began to be officially used by the administration in the Defense Department’s Quadrennial Defense Review Report of February 2006. The Report opens with the statement that “[t]he United States is a nation engaged in what will be a long war” (Department of Defense v). It also refers several times in its report to a ‘global long war.’

This long war against terrorism that has no end in sight means that there is no end to the state of exception. The contradiction of the state of exception, that “the
constitution must be suspended in order to be saved,” is normally resolved “by understanding that the period of crisis and exception is brief” (Hardt and Negri 8). This is extremely problematic when the time of crisis is indefinite, as with the war on terror, because the state of exception is not compatible with democracy: “like justice, democracy does not belong to war. War always requires strict hierarchy and obedience and thus the partial or total suspension of democratic participation and exchange” (17). These times of crises supposedly justify giving extraordinary powers to the executive and government. The state of exception places national security concerns above all and human rights and civil liberties are regarded as incompatible with security concerns. There is no end in sight with this new war, and this is having negative consequences for human rights.

The U.S. government has also shifted from a policy of defense to one of security. The 2006 National Security Strategy reasserted several statements that it made in its previous security strategy: that terrorism is “a new enemy with global reach” and as such “[t]he United States can no longer simply rely on deterrence to keep the terrorists at bay or defensive measures to thwart them at the last moment.” Rather, “[t]he fight must be taken to the enemy.” (The National Security Strategy of the United States of America 2006, 8) The executive further declared that “[t]o forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right to self-defense” (18). This has serious implications as defense is reactive policy, whereas security is an active one. “[P]roponents of security require more than simply conserving the present order – if we wait to react to threats, they claim, it will be too late. Security requires rather actively and constantly shaping the environment

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through military and/or police activity.” (Hardt and Negri 20) Defense, on the other hand, requires only “a protective barrier against external threats.” Lastly, the ongoing state of exception also necessitates the use of force as a first, instead of last, resort. (21) This stands in contrast to the policy of other modern democratic nations, who “uniformly outlawed all forms of military aggression, and their constitutions gave parliaments power only to declare defensive wars” (20).

The dilemma of security v. human rights is an interesting shift from pre-World War II ideology. Before the Second World War, the sovereignty of the nation-state was sacred and largely unquestioned. This concept of sovereignty adhered to the Westphalian model where, in the absence of a superior authority, the nation-state had supreme authority to do as it pleased without interference from other nations. Westphalian nations pursue their own national interests above all else. (Held 78) World War II changed this view as national sovereignty was challenged by human rights. The world, horrified by the Holocaust, decided that the nation-state was no longer allowed to do ‘whatever it wanted,’ and what happened inside its borders became of international concern. The Nuremberg Trials “laid down, for the first time in history, that when international rule that protect basic humanitarian values are in conflict with state laws, every individual must transgress the state laws” (101). However, this standard has been seriously undermined by the United States’ subordination of human rights to security. Before World War II it was sovereignty v. human rights, today it has become an issue of security v. human rights. This is, in a way, a return to Westphalian sovereignty where national interests are placed above all else. But this is national sovereignty disguised as security and self-defense, interests that are much more difficult to refute. The Westphalian
argument held that a nation had the right to do whatever it wanted without interference because it was sovereign. Today the argument can be made that the U.S. can do whatever it wants without interference because it is simply trying to protect its people – isn’t that a noble and just cause? And unlike Westphalian notions, which concern national interests and national interests alone, the U.S. argues that the war on terror is fought to protect the lives of its citizens and the security of the entire world. The Bush administration holds that fighting terror is in not only its own interests but the interests of the world. The U.S. is practicing a dangerous form of American exceptionalism in which it makes the exceptional claim that it has the responsibility to rid the world of the evils of terrorism. These declarations are perilously self-righteous and crusade-like and give the U.S. the justification for acting without restraint and without holding itself to the standards of the rest of the international community. The U.S. acts unilaterally while claiming to act multilaterally, which it does only to the extent that it thinks is necessary and to which it benefits. As discussed foremost in section three, this type of exceptionalism is having extremely negative consequences.

The Bush administration’s stress on the new and unconventional nature of this war on terror is also cause for alarm. In the latest National Security Strategy it is emphasized repeatedly that “[t]he security environment confronting the United States today is radically different from what we have faced before” (The National Security Strategy of the United States of America 2006, 18). It advocates the transformation of America’s national security institutions because they were “designed in a different era to meet different challenges” (43). This new approach for a new type of war has in part taken form in what David Luban, Professor of Law and Philosophy at Georgetown
University, calls the hybrid war-law model. Generally there are two models that the U.S. has followed in its fight against terrorism: the war model and the law model. The law model concerns matters within states, while the war model concerns matters between states. (Luban “The War on Terrorism and the End of Human Rights” 225). The war model gives the government considerably more free reign than the law model. (219) For example:

1. “[I]n war but not in law it is permissible to use lethal force on enemy troops regardless of their degree of personal involvement with the adversary. The conscripted cook is as legitimate a target as the enemy general…”
2. “[I]n war but not in law 'collateral damage,' that is, foreseen but unintended killing of noncombatants, is permissible. (Police cannot blow up an apartment building full of people because a murderer is inside, but an air force can bomb the building if it contains a military target)…”
3. “[T]he requirements of evidence and proof are drastically weaker in war than in criminal justice…”
4. “[I]n war one can attack an enemy without concern over whether he has done anything…” (219-220)

The war model, however, also has several disadvantages:

1. “[I]n war but not in law, fighting back is a legitimate response of the enemy…”
2. “[B]ecause fighting back is legitimate, in war the enemy soldier deserves special regard once he is rendered harmless through injury or surrender…”
3. “[W]hen the war concludes, the enemy soldier must be repatriated…”
4. “[W]hen nations fight war, other nations may legitimately opt for neutrality…” (220)

Such disadvantages do not appeal to the Bush administration, who regards such a model of traditional warfare as a constraint. Instead of being confined to either the law or war model terrorism is regarded as both a military adversary and also as a criminal conspiracy. Thus, the administration has chosen to combine the most advantageous elements of both the war and law models to best suit its needs: “By selectively combining
elements of the war model and elements of the law model, Washington is able to maximize its own ability to mobilize lethal force against terrorists” (221). The administration’s designation of unlawful combatants best exemplifies their utilization of the hybrid war-law approach:

In line with the war model, the detainees lack the usual rights of criminal suspects – the presumption of innocence, the right to a hearing to determine guilt…But in line with the law model, they are considered unlawful combatants, because they are not uniformed forces, and therefore they lack the rights of prisoners of war. (221)

This hybrid war-law model leaves these detainees in a “limbo of rightlessness” (221). Suspected terrorist detainees are neither warriors nor criminals and are deprived of the basic rights of either.

The case made for this approach is that the war on terror is not a traditional war among states but a new war that requires a new approach – the very case that the Bush administration has made. According to this reasoning, terrorists pose a unique threat. Conventional soldiers, for example, may be innocent. That is, “[m]any are conscripts, and those who aren’t do not necessarily endorse the state policies they are fighting to defend.” Terrorists, on the other hand, follow their path of their own choosing and “are neither morally nor politically innocent” and thus “are much more akin to criminal conspirators than to conscript soldiers.” But terrorists are also unlike ordinary criminals. The aim of the common criminal is not to kill innocent bystanders or to kill as many people as possible. Nor do criminals employ weapons of mass destruction. Following this line of reasoning, “a stronger response that grants potential terrorists fewer rights may be justified” and “it is appropriate to treat them as though they embodied the most dangerous aspects of both warriors and criminals.” (224)
Some things have undoubtedly changed since September 11th, and terrorists undoubtedly pose a different and in some ways more dangerous threat than those posed by traditional wars and soldiers. However, “Americans’ urgent desire to minimize their risks doesn’t make other people’s rights disappear” (Luban “The War on Terrorism and the End of Human Rights” 225). The Bush administration cannot simply act unilaterally by creating its own model with disregard to international laws and precedents. In doing so it threatens to alienate the international community and undermine the authority and influential power of international human rights law. If the war on terror is “a new kind of war” and “not the traditional clash between nations adhering to the laws of war that formed the backdrop for GPW [Geneva Conventions]” it must make its case for the construction of this new model (Gonzales). It should work with the international community to come to consensus on what kind of model should be applied to terrorism and not choose “the bits of the law model and the bits of the war model that are most convenient for American interests, and [ignore] the rest” (224). Acting thusly, without constraint or oversight, the U.S. runs the very high risk of becoming abusive and repressive. Working with the international community would provide the oversight necessary to prevent the development of such behavior.

The Fallacy of Restricting Rights to Achieve Security

Bush’s war on terror policy is based on the fallacy that human rights and civil liberties are a hindrance and obstacle to security. Such rights, however, are necessary to protect us from both the internal threat of the government and the external threat of terrorism. In the debate about rights and security, advocates of the belief that there exist
necessary tradeoffs between the two often ask questions about “[h]ow much liberty should be sacrificed in the name of security” and “[h]ow many human rights can we afford to respect?” (Luban “Eight Fallacies About Liberty and Security 242). David Luban argues that these are the wrong questions to be asked and documents eight common fallacies about liberty and security. The first fallacy concerns the common belief that the “’trade-off’ between security and rights is too easy as long as it’s a trade-off of your rights for my security.” That is, people are willing to accept restrictions on their rights in principle so long as it is not their rights in practice that are in danger but the rights of the accused: “as long as the government targets only Muslims and foreigners…paring back on the rights of the accused is no tragedy.” Those of us who are not Muslims and foreigners, as we are not targets and suspects, are therefore unlikely to need to invoke such rights as the right to a speedy trial or protection against extradition and thus will undervalue them and so be willing to sacrifice those rights for security.

Thus, fallacy one is the fallacy of thinking that it is acceptable to restrict the rights of the accused; that is, that your rights are not as important as my rights. (243) Fallacy two is thinking that rights and security are unrelated and different things. On the contrary: many rights and liberties “are, specifically, security against the abuses of the government’s police power” and “[t]o diminish [them] means to diminish our security against abuses and errors of government officials. (245). Civil liberties like due process rights exist to protect us from, for example, wrongful arrest. And wrongful arrest is a threat that comes not from external forces but from our own government.

Fallacy four concerns the unwavering belief held by many that, as the government claims, these restrictions on liberty are necessarily saving lives. Luban argues that it is
extremely difficult to calculate just how much more secure we are as a result of increasing governmental powers at the expense of rights:

the government possesses formidable intelligence and law-enforcement capacity even without new restrictions on civil liberties, and giving the government added powers to investigate and detain people may itself lower that probability only by a little. As a matter of fact, it might actually raise the probability of missing the next terrorist attack, if the new powers inundate the government with useless information, or provoke negative reactions that cause potential informants to withhold information out of fright or anger. (Luban “Eight Fallacies About Liberty and Security 248)

For example, of the 5,000 or so who were detained in the aftermath of September 11th in the initial roundup, only five were charged with terrorism (249). Thus, it is difficult to justify that all of the measures taken by the government that increase its powers and restrict our liberty are absolutely and completely necessary. One can argue, however, that arresting 5,000 people to catch only five people is justified – but this should not simply be assumed. The government needs to demonstrate that these new restrictions are effectively and absolutely necessary.

Fallacy five is the fallacy, upheld by the government, that America is in a state of perpetual emergency (248). September 11 was a true emergency that did justify certain restrictions on liberty such as the FBI’s initial roundup and detention of thousands of Middle Eastern men. However, months after 9/11, the Justice Department’s rationale for this continued detention and its “pleas of emergency no longer make[] sense: calling long term conditions (like the standing danger of terrorism) an ‘emergency’ is a confusion.” September 11 was an emergency, but “[d]aily life under long-term risk is not.” (249) The Bush administration would have us believe that we are living in a perpetual emergency. The Defense Department’s Quadrennial Defense Review Report exemplifies this. It
characterizes “this era” as one that has experienced shifts from: “a peacetime tempo – to a wartime sense of urgency”; “a time of reasonable predictability – to an era of surprise and uncertainty”; “a battle-ready force (peace) – to battle-hardened forces (war)” (Department of Defense vi). As we have seen, it is very dangerous to normalize an emergency because the suspension of rights and enhancement of governmental powers that are deemed necessary to deal with the crisis are generally tolerated only because they are assumed to be temporary.

Fallacy Six is the fallacy of believing that all rights and liberties are the same. Luban differentiates between two kinds: powers and protections. Powers give individuals the ability to do something, while protections are guarantees against government error and abuse. For example, the right to free speech is a power while the right to trial by jury is a protection. Furthermore, restrictions on protections are much more dangerous that those on powers. A curfew, for instance, “diminishes people’s powers, but it doesn’t enormously increase the risk of government abuse.” (Luban “Eight Fallacies About Liberty and Security” 250)

The problem arises when people conflate the two and argue that we have too many liberties for this dangerous world. These people may have a point when they are referring to powers. Perhaps, for example, none of us can ever again afford the liberty of being able to board airlines without having our shoes x-rayed and our luggage searched. The loss of protections is a different matter. If the right of habeas corpus is suspended, or people are detained incommunicado, or arrested secretly, or assassinated, part of the firewall that protects us from government-inflicted evils has gone. (251)

Thus, there are some restrictions on our civil liberties that can be justified. However, there are others, rights that protect us from the government, that should not be
compromised. In addition, others argue that such a loss of protections are necessary evils “because it is simply too difficult or too costly to use the procedures to get it right.” And wouldn’t you rather arrest 100 innocent people so that you might catch one terrorist, who could have hurt hundreds of people, in the dragnet? (251). Luban responds to this argument by saying that this may in fact be necessary in certain instances but that proposition should never be taken on faith. Its proponents must prove that public safety requires wider latitude for officials to shortcut procedures designed to protect people from being imprisoned or killed by mistake. They must prove that public safety would be threatened unless it is possible to keep the names of detainees secret or hold them incommunicado. (251)

The Bush administration has yet to prove beyond rhetoric that these procedures are unquestionably necessary.

Some government officials, and many American people, argue that terrorists don’t deserve these rights and liberties. Why should they benefit from such rights and protections if they are trying to destroy them? The Bush administration has held that Guantanamo Bay detainees are being denied their Geneva Convention rights, such as the right to a hearing, because they are unlawful combatants and thus the Conventions do not apply to them. However, this question is completely inappropriate and misguided because it assumes that all detainees are guilty when we need such rights to hold trials to determine who is guilty and who is innocent. This is fallacy seven: presuming guilt. Furthermore, this fallacy allows questionable treatment of detainees to continue with the general acquiescence of the American people because they assume the detainees are guilty and thus deserve such treatment. (Luban “Eight Fallacies About Liberty and Security” 252) The last fallacy is the militarization of civilian life. The American people and the other branches of the government are guilty of undue deference to the executive
branch. The Bush administration, for example, “appeals to the president’s war power to argue that the judiciary should defer to the executive on military matters such as who to designate an enemy combatant” (254). However, the president is a civilian and the executive branch does not have the military expertise and prowess that it claims gives overreaching superiority to the president’s war power. And in the case of the administration’s designation of unlawful combatants, “there was really no need for courts to defer to the executive, because the basic task – determining how the law should clarify a set of facts – is a pre-eminently judicial function.” (255) This last fallacy has extremely dangerous implications. If “the executive is exercising his war powers in short-cutting peacetime civil liberties” and “other branches of government must defer to the executive on war-powers issues” and “the battlefields is coextensive with the U.S., or the world”, then the executive is given vast authority and supremacy that is dangerously unchecked. When the executive exercises such immense powers, a dangerous consequence follows: civil liberties and human rights exist only at the sufferance of the American president, who can unilaterally reduce or suspend them based on factual declarations of military exigency that demand deferential review by the rest of government. All that stands between us and the militarization of civilian life is the president’s say-so. (255)

Far too much power is being claimed and exercised by one person, let alone one branch of government.

Luban concludes that asking how many rights we should sacrifice for security is the wrong question “because it rests on [these] mistaken assumptions”. The question we should be asking is instead: “How much of your own protection against bureaucratic errors or malice by the government – errors or malice that could land you in jail – are you willing to sacrifice in return for minute increments in security?” (256) Thus, we
have seen how civil liberties and rights are necessary to protect us from the errors and abuse of our own government. People don’t often consider that limiting their rights diminishes their security against the government. This threat is very often overlooked and is overshadowed by the external threat posed by terrorists. However, rights are essential to ensure our security against this threat as well.

The Bush administration does not understand is that its failure to abide by international human rights standards and it support of regimes with poor human rights records actually fuels terrorism rather than combats it. Human rights can actually help fight terrorism. As aforementioned in section three, what terrorism, though it has numerous manifestations, “almost always [has] in common is that [it has] been fueled by violations of human rights” (Schulz 20). These violations can help create and sustain terrorism in a variety of ways. Many terrorists have experienced human rights abuse first-hand, and their supporters are often oppressed and poor populations who do not feel that the United States is concerned about their plight and often feel that they have no way to express themselves other than through violence (23). Thus, respecting human rights can help to diminish the creation of terrorists and the appeal of extremism, and thus the pool of terrorist recruits (200-202). The U.S. has also underestimated the potential damage that the torture controversy and images from Abu Ghraib have caused. Our perceived disregard for human rights will only risk breeding more terrorists as it sends the message to the world that we are just as evil as the repressive regimes that so many terrorists and their supporters live under or who are in league with the terrorists themselves. The U.S. will not receive public support where it needs it most when it has a perceived policy of human rights abuse: “we need to ask ourselves if secret detentions
and racial profiling are what America wants to stand for: not promise, but discrimination; not due process, but prejudice; not liberty, but chains” (91). The government’s treatment of foreigners is also damaging to anti-terrorism. Typecasting students who are being educated here, who “are the best potential allies for the United States when [they] go back to [their]native countries” turns their love and respect for the U.S. into anger and distrust (105). Promoting human rights can also put lie to the claim that the war on terror is really a war against Islam (80-81). Finally, I do not claim that commitment to human rights alone will win the war on terrorism. “Abiding by human rights standards is not sufficient to diminish the threat of terrorism, but it certainly is a necessary condition for achieving that goal” (21).

Despite the argument made against compromising rights in the name of security, it is important to admit that there are some situations that necessitate the curtailment of liberties and that perhaps 9/11 does require us to consider that traditional laws of war and international human rights laws may need to be reassessed in the face of the threat of terrorism:

September 11 may not have ‘changed everything,’ but it certainly changed some things and, if we in the human rights community fail to recognize that we are living in a new world, if we are unwilling to think about rights in new ways, we end up being righteous at the expense of being relevant. (Schulz 173)

It must be recognized that there are times when restrictions on civil liberties truly are necessary to protect us and can be done without “doing untold damage to our civil liberties” (174). Who, for example, would argue placing limits on the right to free speech of someone who shouts ‘fire’ in a crowded theater? The arrest and detention of thousands of men in the immediate aftermath of September 11 was also justified: “The
embarrassment and fright of the interviewees was a small price to pay for an absolutely essential investigation” and “[e]ven those who were wrongly arrested and detained should have been able to understand that in such a situation investigators had little alternative to sweeping very broadly” (Luban “Eight Fallacies About Liberty and Security” 249). In addition, the government faces some very real dilemmas about respecting human rights. For example:

If Saudi Arabia offers to limit its financial support for terrorist networks and, while respecting due process, extradite terrorist suspects to the United States to stand trial, ought we temper our criticism of the kingdom’s human rights record long enough to guarantee their cooperation? (Schulz 175)

Even the International Covenant on Civil and Political Rights (ICCPR) contains provisions for which “‘in a time of public emergency which threatens the life of the nation,’ states party to the ICCPR ‘may take measures derogating from their obligations’” (Schulz 183). The Universal Declaration of Human rights also “allows that limitations on rights and freedoms may be imposed” (186). Thus, even international law recognizes the state of exception model where, in a time of crisis, not all rights need be enforced.

However, Bush administration, as demonstrated, has gone too far. As discussed in section two, the Bush administration has made arguments that the President has the authority to suspend international law if it is in the interests of national security. “Curtailment of rights must be a last resort” and “the limitations must be as minimal as possible to meet the necessity” (Schulz 188-189). And while international laws like the ICCPR allow for the restriction of rights, it also states that “limitations on rights must not compromise other obligations the state has under international law”, “must not involve discrimination”, and “must be temporary” (191). The September 11 attacks “would have
induced any American leadership immediately to put the security of the society at the center of its political agenda” (Falk 230). Indeed, we have seen numerous examples times when the government has put security above all other concerns and when previous presidents have taken controversial measures in the name of national security. But human rights and civil liberties do not need to be sacrificed for security. Rather, they are an important benefactor of security. And while there do exist times of emergency that justify the curtailment of liberty, Bush’s indefinite ‘global long war against terrorism’ is not one of them.

There is one more security threat that has not been explicitly addressed. Security threats can come from two places: one internal and one external. It is clear that civil liberties are unquestionably necessary for security against the internal threat of the government. Civil liberties are important for protection against government abuse and error no matter what type of external threat there may be. It is also apparent that support for human rights is essential to combating the external threat of terrorism. However, as aforementioned, there do exist situations in which the restriction of rights is justified. Emergencies and times of crisis may necessitate some curtailment of liberty. Furthermore, the Bush administration is correct in arguing that terrorists pose a unique threat, one that our international system has yet to define and accommodate. Terrorists are not quite soldiers and not quite criminals. Their unique status needs to be addressed, and international human rights law, created within state frameworks, must be redefined to include them. Though as previously mentioned the U.S. is wrong to make such decisions unilaterally.
But what about other external threats that are not terrorism, such as the traditional militaristic threat of war by another nation-state? Human rights are important here as well. The Geneva Conventions exist to protect the rights of civilians, the wounded, and prisoners of war. The restriction of civil liberties, however, can be justified during a time of war, as it is an emergency that is not indefinite. Thus, the restriction and enhancement of governmental powers is understood to be brief and therefore more tolerable. The government undoubtedly responds differently to these two external threats. In addition, while human rights are important during wartime, the respect for rights is minimum and “far less robust than [respect for ] rights in peacetime” (Luban “The War on Terrorism and the End of Human Rights” (227). The war model is obviously a threat to international human rights “because honoring human rights during war to the same extent as in peacetime is neither practically possible nor theoretically required” (226). Only during wartime, for example, is collateral damage permissible. That is, it is permissible to sacrificially kill noncombatants in order to kill the enemy. This would never be allowed during anything but wartime: “Police cannot blow up an apartment building full of people because a murderer is inside, but an air force can bomb the building if it contains a military target” (219-220). However, I believe that human rights and civil liberties are more essential to achieving security against terrorism than against a militaristic threat. First, support for human rights, as has been discussed, can help fight terrorism at its root. Secondly, there do not exist any internationally agreed upon codified laws regarding the ‘laws or terrorism.’ Such laws do exist regarding the laws of war: the Geneva Conventions. Therefore, human rights, while still important in traditional wartime, are a much more essential to achieving security against terrorism.
Conclusion

Determining exactly when and where rights do need to be restricted for the sake of security is no easy task. Where do you set the bar for what constitutes an emergency that justifies imposing limits on rights and liberties?

Governments will generally set the bar too low, but human rights groups tend to be unwilling to admit that there is a bar at all. Determining where that bar is set, however, where the right balance lies between security and rights, is the major human rights challenge in an age of terror. (Schulz 183)

Finding the right combination of security and liberty “is an immensely complicated calculus” but one that is essential (193). The job of human rights activists, as William Schulz argues, is to find that balance and argue its necessity. Only then can a proper argument be made to government officials that the Bush administration’s war on terror policy is doing a lot of harm where it could be doing a lot of good. Not only are we less secure as a nation, but the U.S. has also damaged the entire human rights agenda. The U.S. is an exceptional nation and could be advancing the cause of human rights as part of its strategy against terrorism. That is the positive aspect of American exceptionalism: its potential for exceptional leadership. “Experience teaches that when the United States leads on human rights, from Nuremberg to Kosovo, other countries follow. When the United States does not lead, often nothing happens, or worse yet, as in Rwanda or Bosnia, disasters occur because the United States does not get involved.” (Hogjuh Koh 119)

And while human rights can and have advanced without the leadership of the U.S., “no other country takes a comparable interest or has a comparable influence worldwide” (120). A British diplomat who came to work at the State Department remarked: “When
something happens in the world, the Americans ask, ‘What should we do?’ The British ask, ‘What will the Americans do?’” (119). The U.S., however, must avoid the pitfalls and dangers of exceptionalism. Not all leadership or action taken by the U.S. is positive. Exceptionalism, as we have seen, can have very negative consequences. The war on terror demonstrates that even though the Bush administration claims to be acting for the security of the entire world it has instead made America and the international community less safe. Though it claims to be a champion of human rights it has actually damaged their cause and lost its own credibility. If the administration is truly committed to human rights, it should have done more to combat the negative effects of the torture controversy and demonstrated through action, rather than through words, its dedication to human rights promotion. Comedian Rob Corddry put it best when he sarcastically noted:

> There’s no question what took place in that prison was horrible. But the Arab world has to realize that the US shouldn’t be judged on the actions of a…well, we shouldn’t be judge on actions. It’s our principles that matter, our inspiring, abstract notions. Remember: just because torturing prisoners is something we did, doesn’t mean it’s something we would do. (Danner)

The Bush administration must work and act multilaterally and lead more by example, within the bounds of international law, than by basing its leadership on its ability to act outside of those bounds. Positive exceptionalism is leading by exceptional commitment to human rights and international standards, both at home and abroad, and not by maintaining the right to dispose of them at will. “The actions of the U.S. government are being closely followed and emulated by other governments around the world” (Lawyers Committee for Human Rights 78). Imagine what a driving force for rights the United States could be if it gave them something more positive to emulate.
Works Cited


