REPAIRING OUR HUMAN RIGHTS REPUTATION

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The start of a new law school year is a most fitting time to think anew about what we stand for, as lawyers and Americans. I hope I can use this occasion to address a most serious subject: repairing our human rights reputation.

Let me say up front that what you are about to hear is not a partisan message: during my career, I have worked both in and out of government. I have worked in the Justice Department for a Republican administration and in the State Department for a Democratic administration, and I have sued both Republican and Democratic administrations for human rights violations. I believe that the task of repairing America's human rights reputation is one of the most serious problems we as Americans face today.

Since all of us have been alive, our country, the United States, has been the world's acknowledged human rights leader. That is certainly why my parents came here, and probably yours as well. Since World War II, ours was universally regarded as a nation that values human rights and the rule of law, that speaks out against injustice and dictatorship, and that tries to practice what we preach. Of course we have never been perfect, but we have usually been thought to be sincere. When I was a diplomat for the United States government, I was always struck by how seriously other countries would listen to what Americans had to say. They listened to us because we were powerful, sure, but they thought us powerful because they thought we were principled. Our commitments to principles of human rights and the rule of law were seen as a major source of our soft power.

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But in the last few years, sadly, much of this has changed. I travel a lot. Maybe you do too. And if you have traveled abroad in the last few years, you cannot help but notice the steady decline of our global human rights reputation. In the last seven years, we have gone from being viewed as the major supporter of the international human rights system to its major target. Our obsessive focus on the War on Terror has taken an extraordinary toll upon our global human rights policy. Seven years of defining our human rights policy through the lens of the War on Terror has clouded our human rights reputation, given cover to abuses committed by our allies in that War, and blunted our ability to criticize and deter gross violators elsewhere in the world.

After September 11, 2001, we were properly viewed with universal sympathy as victims of a brutal attack. But we have responded with a series of unnecessary, self-inflicted wounds, which have gravely diminished America's standing as the world's human rights leader. You know the list as well as I do: the horror of Abu Ghraib; our disastrous policy on Guantánamo; our tolerance of torture and cruel treatment for detainees; our counterproductive decision to create military commissions; warrantless government wiretapping; our attack on the United Nations and its human rights bodies, including the International Criminal Court; and the denial of habeas corpus for suspected terrorist detainees that, thankfully, was struck down this past summer by a narrow majority of the United States Supreme Court.

Whatever you may think of these policies, there can be little doubt that the impact on our human rights reputation has been devastating. In a recent Pew Global Attitudes survey, favorable opinions of the United States had fallen in most of our fifteen closest allies—including Spain, India, and Indonesia—even though those polled largely shared our views as to the greatest dangers in the world.[1] And in these countries, amazingly, America's continuing presence in Iraq is cited as a danger to world peace at least as often as the growing threat of Iran.[2] Today, a vast majority of our allies believe that our policies on Guantánamo are illegal. And a recent foreign policy survey showed that many Americans believe that the

1. PEW GLOBAL ATTITUDES PROJECT, NO GLOBAL WARMING ALARM IN THE U.S., CHINA: AMERICA'S IMAGE SLIPS, BUT ALLIES SHARE U.S. CONCERN OVER IRAN, HAMAS 10-11 (2006), http://pewglobal.org/reports/pdf/252.pdf. Shared concerns included global warming and peace in the Middle East between Israel and Palestine. *Id.* at 21-23.

2. *Id.* at 13, 15.

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ability of the United States to achieve its foreign policy goals has decreased significantly over the last few years and that improving America's standing in the world should become a major goal of U.S. foreign policy.[3]

When I was Assistant Secretary for Human Rights in 1999, I told a United Nations body that the United States is "unalterably committed to a world without torture."[4] That was not a casual statement; I had cleared that statement with every relevant agency of the United States government. But, in just a few short years, we seem to have gone from what was a zero-tolerance policy toward torture to what now seems to be a zero-accountability policy.

Increasingly, that problem afflicts our popular culture. *The New Yorker* magazine reports that before September 11th, there were only four torture scenes on television each year; after September 11th, the average rose to at least one hundred torture scenes a year, with United States government officials regularly shown as justifiably committing crimes against humanity.[5] On the popular television show *24*, American officials are seen committing torture nearly every week. The question we should ask ourselves is: "is torture really making us safer?" After all, *24* is widely exported by DVD to the Middle East.[6] If millions of television watchers in that region think that Americans routinely torture detainees, why should we expect them to act differently toward their detainees, who may in time come to include our own citizens and soldiers?

And what impact does this have on our ability to help solve the acute problems around the world, especially in the Middle East? The *Washington Post* recently noted that the United States is no longer a player "across the board" in the Middle East.[7] More coun-

3. THE CHICAGO COUNCIL ON GLOBAL AFFAIRS, GLOBAL VIEWS 2008: TROUBLED BY LOSS OF STANDING IN THE WORLD, AMERICANS SUPPORT MAJOR FOREIGN POLICY CHANGES 1-2 (2008), http://www.thechicagocouncil.org/UserFiles/File/POS_Topline%20Reports/POS%202008/2008%20Public%20Opinion_Foreign%20Policy.pdf.

4. *See* Statement of Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights and Labor, On-the-Record Briefing on the *Initial Report of the United States of America to the UN Committee Against Torture*, Washington, D.C., Oct. 15, 1999, *available at* http://www.state.gov/www/policy_remarks/1999/991015_koh_rpt_torture.html.

5. Jane Mayer, *Letter from Hollywood: Whatever it Takes*, THE NEW YORKER, Feb. 19, 2007, at 68.

6. *See generally* JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008).

7. Robin Wright & Glenn Kessler, *U.S. Faces a Middle East Hungry for Peace Specifics*, WASH. POST, Sept. 18, 2007, at A15.

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tries in the region simply do not listen to us anymore, and openly make moves that go against our stated policies and strategy.

So this is our problem: how to repair our tarnished human rights reputation. As a nation, and as families, we face many problems—the price of gas, housing, and food, just to name a few—but as a law dean and human rights lawyer, let me ask you not to ignore what I think is the most serious problem facing Americans today.

The reason is simple. Since World War II, our country has been the balance wheel of the global human rights system because our reputation for human rights principles and commitment to law made us the engine that drove the global human rights system. In the post-Cold War world, from the fall of the Berlin Wall to the fall of the Twin Towers, we tried to revive the human rights system—in the Balkans, in Sierra Leone, in East Timor, in The Hague. But since September 11th, the post-post Cold War era has seen us too often siding with Pakistan in defending torture, siding with China in defending arbitrary detentions of Uighur Muslims, and siding with Russia in defending human rights abuses against Chechens as part of the "War on Terror."

When our human rights system loses its balance, why should we be surprised when the world seems to go out of whack? And so, in the last few months, we have witnessed the constitutionalization of emergency rule in Egypt, the loss of democracy in Pakistan, stolen elections in Zimbabwe and Burma, and United States government officials who refuse to say that waterboarding is torture, even when it is committed by foreign countries against our own troops.[8]

As Tom Friedman of the *New York Times* recently noted, last year was by far the worst year for freedom in the world since the end of the Cold War.[9] Freedom House reports that almost four times as many states declined in their freedom scores as improved.[10] And note this: among the least democratic countries in the world are those who derive most of their revenues from oil. So

8. The term "waterboarding" describes an interrogation technique in which a prisoner is strapped down while an interrogator pours water over his mouth and nose, which creates the illusion of drowning. *See* Scott Shane, *A Firsthand Experience Before Decision on Torture*, N.Y. TIMES, Nov. 7, 2007, at A22.

9. Thomas L. Friedman, Editorial, *The Democratic Recession*, N.Y. TIMES, May 7, 2008.

10. ARCH PUDDINGTON, FREEDOM HOUSE, Freedom in Retreat: Is the Tide Turning?—Findings of *Freedom in the World* 2008 1 (2008), http://www.freedomhouse.org/uploads/fiw08launch/FIW08Overview.pdf. Freedom House is a nonprofit, nongovernmental organization that seeks to promote freedom throughout the world by pro-

as the price of fuel rises, and with it the price of food, we must cut our reliance on fossil fuels not just to save money, not just to protect the environment, not just to promote our national security, but to promote the rule of law by reducing our dangerous dependence on a commodity that strengthens petro-dictators and weakens democracy worldwide.

If this is our problem, what is the solution? A full answer could take hours, but let me suggest four simple steps. First and most simply, we must return to telling the truth. We must start by saying simple things: Waterboarding is torture. The leaders of Pakistan, Burma, and Zimbabwe are crushing democracy and the rule of law.

Second, we need to stop pushing for double standards in human rights. If we believe that human rights are universal, we must respect them, even for suspected terrorists. If human rights are universal, we should not have law-free zones, like Guantánamo. We should not have law-free courts, like military commissions. We should not have law-free practices, like extraordinary rendition. And we should not have law-free persons whom we call "enemy combatants."

Two years ago, the Supreme Court held that even with respect to terrorist suspects, the Government is bound to respect Common Article 3 of the Geneva Conventions.[11] A few days later, I testified before Congress.[12] A senator said to me that the last time he checked, the terrorists had not signed the Geneva Conventions.[13] I answered, in effect, "Senator, the last time I checked, the whales had not signed the Whaling Convention either!"[14] Like much of international law, the Geneva Conventions are not about the terrorists and who they are. The Conventions are about us and who we are. They are about how we are obliged to treat detainees, how-

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moting democratic political systems. *See* Freedomhouse.org, About Us, http://www.freedomhouse.org/template.cfm?page=2 (last visited Mar. 15, 2009).

11. Hamdan v. Rumsfeld, 548 U.S. 557, 635 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as recognized in* Boumediene v. Bush, 128 S. Ct. 2229 (2008).

12. Hamdan v. Rumsfeld*: Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Harold Hongju Koh, Dean, Yale Law School). The webcast of this hearing is available at the Senate Committee on the Judiciary website. *See* United States Senate Committee on the Judiciary, *Hamdan v. Rumsfeld*: Establishing a Constitutional Process, http://judiciary.senate.gov/hearings/hearing.cfm?id=1986 (last visited Mar. 15, 2009).

13. *Id.*

14. *Id.*

ever they behave. And as a matter of universal principle, we must give all detainees basic humane treatment, however heinous they may be.

Last summer, the Supreme Court took an important step toward eliminating double standards in its landmark opinion in *Boumediene v. Bush*.[15] That decision is controversial, but if you read it closely, you will find that it is clearly right. As Justice Anthony Kennedy wrote in his majority opinion:

> Security subsists . . . in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.
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> . . . .
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> . . . We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.[16]

Third, we need to put our own house in order and stop causing human rights disasters of our own: whether at Abu Ghraib, Guantánamo, or other Black Sites where ghost detainees are being held. Not only must we dismantle old bad policies that have been adopted since September 11th, we should stop new bad policies that some are now offering as replacements. In the days since the Supreme Court's decision in *Boumediene*, for example, some commentators are now calling for Congress to respond to the habeas corpus decision with a Terror Court that would allow suspects to be held in potentially indefinite detention.[17]

While these advocates are well-meaning, make no mistake: this is an extraordinarily bad idea. When did our standard for due process of law become "at least it's better than Guantánamo"? And why, we should ask, won't a system of preventive detention become

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15. Boumediene v. Bush, 128 S. Ct. 2229 (2008).

16. *Id.* at 2277.

17. *See, e.g.*, Harvey Rishikoff, *Is it Time for a Federal Terrorist Court? Terrorists and Prosecution: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 1, 5 (2003); Jack Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19; BENJAMIN WITTES & MARK GITENSTEIN, BROOKINGS INST., A LEGAL FRAMEWORK FOR DETAINING TERRORISTS: ENACT A LAW TO END THE CLASH OVER RIGHTS 12 (2007), http://www.brookings.edu/~/media/Files/Projects/Opportunity08/PB_Terrorism_Wittes.pdf.

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a breeding ground for terrorists, as occurred in British prisons for the Northern Irish? And what about "credible justice"? Why should those in the Middle East whom we are trying to persuade accept the justice meted out by secret terror courts? As a nation, we should not accept that indefinite detention without trial, abusive interrogation, and other unacceptable practices have now become necessary features of a post-September 11th world. Our goal in the next period should be to end debacles like Guantánamo, not to set its worst features in concrete.

Fourth and finally, we need to support, not attack, the institutions and tools of international law. I know that international law and the United Nations are imperfect; but frankly, they are all we have got. We need to support the International Criminal Court and to endorse universal standards by ratifying such human rights treaties as the Convention on Disability Rights,[18] the Convention Against Forced Disappearances,[19] the Convention on the Elimination of Discrimination Against Women,[20] and the Convention on the Rights of the Child.[21] Right now, amazingly, we are one of only two countries in the United Nations that is not a party to the Children's Rights treaty.[22] The other is Somalia, whose excuse is that they have no organized government. We have no excuse.

I know that the years since September 11th have been tiring, but mark my words: the last eight years are far less important than the next eight. For the next eight years will determine whether the pendulum of American policy will swing back from where it has been pushed, or whether it will stay stuck in the direction in which it has been pushed since September 11th. In the next few years, we simply cannot allow our policy toward international law and human rights to be subsumed entirely under the "War on Terror." There are simply too many other global issues that demand our country's attention.

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18. Convention on the Rights of Persons with Disabilities, *adopted* Dec. 13, 2006, 46 I.L.M 443.

19. International Convention for the Protection of All Persons from Enforced Disappearance, *adopted* Dec. 20, 2006, U.N. Doc. A/61/488 (2006) (not yet in force).

20. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13.

21. Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3.

22. *See* OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (2004), http://www.unhchr.ch/pdf/report.pdf (showing that the Treaty has been ratified by all of the member countries of the United Nations, with the exception of the United States and Somalia—although, both have signed the treaty).

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This should not be a partisan point: One presidential candidate recently wrote:

> We Americans recall the words of our founders in the Declaration of Independence, that we must pay "decent respect to the opinions of mankind."
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> . . . .
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> We all have to live up to our own high standards of morality and international responsibility. We will fight the terrorists and at the same time defend the rights that are the foundations of our societies. We cannot torture or treat inhumanely the suspected terrorists that we have captured.[23]

The speaker, of course, was Senator John McCain, but the same views have been expressed just as strongly by Senator Barack Obama, who said:

> We are going to lead by example, by maintaining the highest standards of civil liberties and human rights, which is why I will close Guantánamo and restore habeas corpus and say no to torture. Because if you are ready for change, then you can elect a president who has taught the Constitution, and believes in the Constitution, and will obey the Constitution of the United States of America.[24]

Obviously, we must ask our government officials to speak up for these four steps—to tell the truth, to end double standards, to put our own house in order, and to support law and institutions. But the truth is, whatever administration is elected, its leaders will have their own reasons why they cannot change course immediately.

That is why we the people cannot leave it to the politicians. For the core concern of politicians is politics. That is why it is up to ordinary people, like us, to take ownership of this matter of principle. And in recent months, they have. It was the career Justice Department officials, for example, who resisted the government wiretapping program. It was the career military and government lawyers who spoke up against torture. It was a horrified soldier who gave the digital photos to the media that exposed Abu Ghraib. And it was that wild-eyed group of radicals, the librarians of

23. John McCain, *America Must be a Good Role Model*, FIN. TIMES, Mar. 18, 2008, http://www.ft.com/cms/s/0/c7e219e2-f4ea-11dc-a21b-000077b07658.html?nclick_check=1 (quoting THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)).

24. Senator Barack Obama, Sen. Obama Delivers Remarks on Primary Results (Feb. 19, 2008), *available at* 2008 WLNR 3258239.

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America, who protested the extension of the Patriot Act to library records.

I know what you are thinking: in this world, what can one ordinary person do to change the course of human rights history? But surely a woman named Rosa Parks thought the same before she decided that she would no longer move to the back of the bus. Surely a baseball player named Jackie Robinson had that thought before he went out to play on an all-white baseball team in an all-white league.

And they are not alone. All over this world there are human rights heroes, like Nelson Mandela of South Africa, Aung Sun Suu Kyi of Burma, Andrei Sakharov of Russia, and Vaclav Havel of the Czech Republic, who said, in effect, "We can protect freedom if we have the courage to stand up, so let it begin with me." To stand up, you need not be a world historical figure. At Hotel Rwanda, it was a quiet hotelkeeper, Paul Rusesabagina, who understood that, "'Never again' should mean 'Never again.'"[25] And so, armed only with a fax machine, a few bottles of scotch, and his wits, he saved hundreds of his countrymen from genocide.

Perhaps Robert Kennedy said it best in 1966, when he spoke the words now inscribed on his tomb at Arlington National Cemetery:

> It is from numberless diverse acts of courage . . . that human history is . . . shaped. Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, [that] crossing each other from a million different centers of energy and daring . . . build a current that can sweep down the mightiest wall of oppression and resistance.[26]

And as proof that he was right, you need only look at the place where he said that, South Africa, a country transformed by a million individual acts of courage. So what each of us should say today

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25. *See* Press Release, Oxfam International, Oxfam Welcomes Historic Anti-Genocide Move at UN Summit (Nov. 23, 2005), *available at* http://www.oxfam.org/en/news/pressreleases2005/pr050914_un_r2p (quoting Nicola Reindrop of Oxfam International, who was speaking in regards to efforts of the United Nations to address genocide). *See generally* PAUL RUSESABAGINA & TOM ZOELLNER, AN ORDINARY MAN (2006).

26. Senator Robert F. Kennedy, Day of Affirmation Address (June 6, 1966), *in* JOSH GOTTHEIMER, RIPPLES OF HOPE: GREAT AMERICAN CIVIL RIGHTS SPEECHES 288 (2003); *see also* Arlington National Cemetery, Robert F. Kennedy Memorial, http://www.arlingtoncemetery.org/Visitor_information/Robert_F_Kennedy.html (last visited Mar. 15, 2009).

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is "We need to restore our country's human rights reputation, one step at a time, and let it begin with me."

Why is this so important? Because if you have learned nothing else about law, you have learned this: that "We hold these truths to be self-evident, that all [persons] are created equal, . . . endowed by their Creator with certain Inalienable Rights, . . . among [them] . . . Life, Liberty, and the pursuit of Happiness."[27] It was to "secure the Blessings of Liberty to ourselves and our Posterity" that our forefathers "ordain[ed] and establish[ed] . . . [a] Constitution for the United States of America."[28]

What I am saying, in short, is that ours is a country built on human rights. What our laws and traditions tell us is that our human rights reputation defines who we are as a nation and as a people. If this country no longer stands for human rights and the rule of law, then we really don't know who we are anymore.

Let me close with the words of one of my favorite poets, Langston Hughes, who wrote:

> Let America be America again. Let it be the dream it used to be
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> . . . .
>
> O, let my land be a land where Liberty is crowned with no false patriotic wreath.
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> . . . .
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> The land that never has been yet—And yet must be—the land where *every* man is free
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> . . . .
>
> [W]e must take back our land again, America! . . . . [W]e, the people, must redeem . . . And make America again![29]

What I am saying is that restoring our human rights reputation is simply too important a task to leave to politicians. Restoring our human rights reputation is a challenge for each and every member of this country we love. So thank you all for listening. Thank you for dedicating yourselves—as lawyers, law students, and citizens—to the important work of making America America again.

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27. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

28. U.S. CONST. pmbl.

29. LANGSTON HUGHES, *Let America be America Again*, *reprinted in* THE COLLECTED POEMS OF LANGSTON HUGHES 189, 189-91 (Arnold Rampersad & David Roessel eds., 1995).

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