
Paradoxes of Democracy and Justice in the Bush Years

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INTRODUCTION

The final months of the George W. Bush Administration provide an interesting vantage point to examine some of the paradoxes of international affairs and U.S. foreign policy that have troubled his presidency. One paradox is particularly ironic; how is it that the U.S. administration most closely associated with boldly claiming the centrality of freedom and democracy in foreign policy has incurred such opprobrium for its record of failure and betrayal of these principles? And how is it that under this administration the U.S. has been so thoroughly discredited as the leading protagonist for freedom and democracy in the world? This paper argues that the paradox has three elements, (1) the discrepancy between rhetoric and actions, (2) technical shortcomings in Iraq and Afghanistan, and (3) a vision of democracy that does not meet the needs and expectations of the developing world.

The paper has five sections. Section 1 reviews the Bush campaign's and early administration's disdain for state-building, then establishes the critical link between state-building and democracy that animated Bush's foreign policy after 9/11. It then goes on to show how in only a few years, the image of the U.S. as the global champion of democracy, and indeed the American concept of democracy itself have diminished. Section 2 reviews several of the well-known discrepancies between the Bush administration's rhetoric on freedom and democracy, and certain foreign policy choices it made which revealed the limitations of its commitment to freedom and democracy and gave the appearance of hypocrisy. In Section 3, the narrative turns to deficiencies of technique and knowledge which condemned the Bush administration to failure in building democracies in those countries where it genuinely wished to, namely Afghanistan and Iraq. These two elements are relatively well-known – especially the first. The third and final element of the paradox, described in Section 4, has to do with the Bush administration's understanding of freedom and democracy itself, and moreover with the flagging global enthusiasm for what I refer to as

the Washington consensus on freedom and democracy. The paper concludes with some final observations and modest suggestions for future efforts in Section 5.

SECTION 1: NO TO FOREIGN POLICY AS SOCIAL WORK

President George W. Bush took office resolute in his rejection of nation-building, or state-building. During the campaign of 2000, Governor Bush famously derided the concept as an imprudent and profligate misuse of the U.S. military and U.S. treasure, and in the first presidential debate with Democratic candidate Al Gore said; “If we don't stop extending our troops all around the world and nation building missions, then we're going to have a serious problem coming down the road, and I'm going to prevent that.”¹ His skepticism was not only doctrinal; it was a political reaction to the Clinton administration's engagement in wars, stabilization and reconstruction operations in locations where no U.S. national interest was self-evident (at least to the skeptics), such as Somalia, Haiti, and Kosovo. While not known for his expertise in international affairs or foreign policy, during the 2000 campaign Bush seemed to embrace the view of Johns Hopkins University scholar Michael Mandelbaum, who dismissed Clinton's foreign policy as, “social work.”²

Nor did any of Bush's senior foreign policy or national security advisors give any evidence of fully appreciating the importance of, let alone assign any priority to nation or state-building – or the problems of the weak and failing states of the periphery in general. In October 2000 Condoleezza Rice, soon to become the National Security Advisor, told the *New York Times*; “Carrying out civil administration and police functions is simply going to degrade the American capability to do the things America has to do. We don't need to have the 82nd Airborne escorting kids to kindergarten.” General Powell, who became Bush's first Secretary of State, wrote in 1992, “The U.S. should not get involved in peacekeeping or nation-building exercises. ...”³ The record suggests that if Cheney had any priority coming into the Vice Presidency it was to restore and expand the prerogatives of the executive branch while Defense Secretary Rumsfeld's initial priority was reforming the military.

If Bush was hostile to the idea of nation or state-building, the same cannot be said about democracy, liberty, freedom and free markets. On the contrary Bush expressed an evangelical belief in the persuasive, transformative and exemplary powers of these wholesome “mother and apple pie” principles. They remain in Bush's mind the only conceptual template for national success available to modern states. Yet however central they may have been to his faith, the notion of U.S. long-term engagement to build democracy overseas, or develop democracy through American blood or treasure was not originally a part of his foreign policy toolbox. Serious and dedicated long-term investment in commitment to building the institutions of democracy would be tantamount to state-building, and thus just the kind of international social work Bush, and his team, ridiculed. They believed rather that the U.S. role is to serve as the ultimate exemplar of the benefits of democracy, liberty, freedom, etc., to reward and defend other countries embracing these goals, and to humbly encourage the growth of democracy world-wide – from a distance. Prior to the tragic events of 9/11/01, Bush's views on nation-building appear to have been consistent with a realist position, doubting both the ability and the appropriateness of U.S. efforts at nation-building,

¹ The First Gore-Bush Presidential Debate, 10/03/00.

² Michael Mandelbaum, *Foreign Affairs*, Jan/Feb 1996.

³ Colin Powell, “U.S. Forces: Challenges Ahead”, *Foreign Affairs*, Winter 1992/93.

state building, or democratization. “I think what we need to do is *convince people who live in the lands they live in to build the nations*. Maybe I’m missing something here. I mean, we’re going to have kind of a nation building core from America? Absolutely not!”⁴ (my italics).

So President George W. Bush entered office in 2001 with an evangelical faith in the exemplary power of freedom and democracy, little actual experience in foreign affairs, and a deep-seated disdain for state-building or active democratization, which he dismissed as social work. His first inaugural speech in 2001 demonstrated all these attributes; “Our democratic faith is more than the creed of our country, it is the inborn hope of our humanity, an ideal we carry but do not own, a trust we bear and pass along.” “If our country does not lead the cause of freedom, it will not be led.” “The enemies of liberty and our country should make no mistake: America remains engaged in the world by history and by choice, shaping a balance of power that favors freedom. We will defend our allies and our interests. We will show purpose without arrogance. We will meet aggression and bad faith with resolve and strength. And to all nations, we will speak for the values that gave our nation birth.”⁵ There is no mention of a mission to promote democracy, or any national interest in strengthening or democratizing failing or failed states. The Bush administration arrived believing that the U.S. should be a beacon of democracy, lead by example, defend its allies, and be resolute in its self-defense.

CONVERSION

Al Qaeda’s September, 11, 2001 attack on the World Trade Towers and the Pentagon forced the president and his senior foreign policy and national security advisors to re-examine their view of the world and their foreign policy priorities. In his 2002 State of the Union Address, four months after the attacks and after the invasion of Afghanistan and defeat of the Taliban, the President stated that, “We’ll be partners in rebuilding that country (Afghanistan).”⁶ A year after the attacks the President introduced a new National Security Strategy for the United States, with the statement, “weak states, like Afghanistan, can pose as great a danger to our national interests as strong states.”⁷ In a speech at the National Endowment for Democracy (NED) in November, 2003, Bush expanded on the theme to acknowledge that, “Sixty years of Western nations excusing and accommodating the lack of freedom in the Middle East did nothing to make us safe because, in the long-run, **stability** cannot be purchased at the expense of liberty. As long as the Middle East remains a place where freedom does not flourish, it will remain a place of stagnation, resentment, and violence ready for export.” And in the State of the Union Address of 2004, following the invasion of Iraq and the defeat of the Saddam Hussein regime, President Bush stated, “The work of building a new Iraq is hard, and it is right.”⁸ Nation or state-building was now a national mission, at least in Afghanistan and Iraq, and by 2005 the President stated, “Our aim is to build and preserve a community of free and independent nations, with governments that answer to their citizens, and reflect their own cultures.”⁹

⁴ The Second Gore-Bush Presidential Debate, 10/11/00.

⁵ George W. Bush, First Inaugural Address, 01/20/01.

⁶ George W. Bush, 2002 State of the Union Address, 01/29/02.

⁷ National Security Strategy of the United States of America, 09/17/02.

⁸ George W. Bush, 2004 State of the Union Address, 01/20/04.

⁹ George W. Bush, 2005 State of the Union Address, 02/02/05.

STATE BUILDING AND DEMOCRACY

The events of 9/11 catapulted the so-called Neoconservatives to the forefront of the Bush administration. A group including the likes of Paul Wolfowitz, Richard Perle, Douglas Feith, John Bolton, and Scooter Libby seized that moment of national uncertainty to provide a pre-fabricated, face-saving game plan for a stunned President who had dismissed the terrorist threat, was unprepared for the consequences, and clearly had no game plan of his own for dealing with them. It was the intoxicating concoction of state-building and democratic evangelism advocated by the so-called neocons that led the President to embrace the new democratic state-building agenda with such fervor, stridency and passion. And indeed it was that fervor, stridency and passion that ultimately led Bush to announce to the world that, "...it is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world."¹⁰ In addition to providing sustenance and assistance to democracy advocates, Bush promised that, "We will encourage reform in other governments by making clear that success in our relations will require the decent treatment of their own people." Democracy became the central principle guiding U.S. state-building efforts, and in Bush's view the principle feature of successful states.

State-building and democratization are not inter-changeable activities. Democratization may take place in quite well-established states, and some past state-building efforts by the U.S. and others had not emphasized democratization¹¹. Within the spectrum of objectives of a state-building undertaking, democratization is only one objective. However for American development professionals involved in state-building in recent decades the two processes of state-building and democratization have largely fused. No American would strive to build a non-democratic state, and no democracy planner would intentionally plan for a fragile or failing state as a long-term host for democracy. The residual distinction is in the sequencing, emphasis and prioritization of security and stabilization vis a vis early emphasis on elections, political party support or certain aspects of accountability for past acts. These elements while indispensable may be postponed in a state-building effort in order to secure an end to conflict.

Democratic state-building became the clarion call of Bush's senior foreign policy and national security teams. Suddenly Condoleezza Rice, the new Secretary of State, was an avid state-builder and exuberant democratizer. In January 2006, she explained that the goal of her newly announced "transformational diplomacy" was to, "work with our many partners around the world to build and sustain democratic, well-governed states that will respond to the needs of their people and conduct themselves responsibly in the international system."¹² Later in 2006 the one-time realist Rice explained further, "You can't just have an election and leave these states to their own devices ... you have to help to build the infrastructure."¹³ Indeed the administration of George W. Bush became the most vocal and impassioned of any

¹⁰ George W. Bush, Second Inaugural Address, 01/20/05.

¹¹ For a discussion and history of nation-building, including the democratization component, see "America's Role in Nation-Building", RAND 2003, and "The UN's Role in Nation-Building", RAND 2005.

¹² Condoleezza Rice at the School of Foreign Service, Georgetown University, 01/18/06.

¹³ Condoleezza Rice, inaugural meeting of the Advisory Committee on Democracy Promotion on November 6, 2006.

American administration in recent history with respect to the global mission of establishing democratic states. This new agenda ushered in unprecedented funding, and catalyzed ambitious programmatic initiatives, such as the Middle East Partnership Initiative (MEPI) which seeks, “to develop the institutions that are essential to active citizenries and accountable, representative government; to strengthen democratic practices, electoral systems, and civil society, including political parties; to promote the rule of law and an autonomous judiciary; and to enhance the role of an independent, professional news media.” According to the State Department, “In five years, MEPI has devoted more than \$430 million to over 350 projects in 17 countries and territories...”¹⁴ MEPI was additive to existing democracy development and promotion programs implemented by the State Department, the U.S. Agency for International Development (USAID), and a range of other federal agencies, as well as substantial new appropriations for the National Endowment for Democracy (NED), a Congressionally funded non-governmental organization.¹⁵

On the diplomatic front the new agenda had a dramatic impact. In a 2005 speech Secretary Rice said, “For 60 years, we often thought that we could achieve stability without liberty in the Middle East. And ultimately, we got neither. Now, we must recognize, as we do in every other region of the world, that liberty and democracy are the only guarantees of true stability and lasting security.” This was an announcement to the world that the realist position of supporting stable and reliable allies regardless of their political system had been abandoned in favor of the new democracy agenda. “To support democratic aspirations, we must also promote democratic institutions that function transparently and accountably. We must help all young democracies to protect minority rights, to enforce the rule of law, and to build the foundations of good governance, from a thriving economy and a vibrant civil society, to a free media and opportunities for learning and for health for their people.”¹⁶ It appeared that as of that moment, the U.S. would get tough with its autocratic allies. Indeed, Secretary Rice even cancelled a visit to Egypt in protest of the detainment by Egyptian security forces of Mubarek opponent Ayman Nour. Democracy was once again a subject of contentious discussion between the U.S. and Egypt, as well as Saudi Arabia and other allies. According to the newly adopted neoconservative faith, America would not only be a beacon of democracy, but a catalyst for a global democratic transformation. Of course the two main theaters for the new democracy agenda were Afghanistan and Iraq.

UNANTICIPATED RESULTS

It is now 2008 – nearly seven years since the 9/11 attacks. This most recent and energetic American foray into state-building and democracy support has lasted six years. Along with the invasion of Iraq, the democracy and state-building crusade has become the signature issue for the George W. Bush administration in foreign policy. It has absorbed billions of dollars, been mainstreamed into the diplomatic discourse of all the senior administration foreign and national security policy officials, and has rattled the walls around more than a few of America’s less than democratic allies. During this same six year period however the world’s image of the United States as a champion of freedom, a promoter of democracy and

¹⁴ State Department web page; <http://mepi.state.gov/>, (referenced 03/10/08).

¹⁵ The National Endowment for Democracy was established as a non-governmental organization in 1983, however its funding is almost completely provided by the U.S. federal government. Such organizations are sometimes referred to as quasi non-governmental organizations or quangos.

¹⁶ Condoleezza Rice, Princeton University, New Jersey, 09/30/05.

human rights, and a state-builder has shown a spectacular decline. Global polling, studies and surveys have consistently shown a significant deterioration in America's overall image, and particularly its so-called democracy project.

A recent world-wide poll conducted by the Pew Global Attitudes Project in 47 countries and territories indicates that, "Over the last five years, America's image has plummeted throughout much of the world, including sharp drops in favorability among traditional allies in Western Europe, as well as substantial declines in Latin America, the Middle East, and elsewhere. In the past year alone, positive views of the U.S. have declined in Pakistan, China, Egypt, and Germany." But what is striking in this survey is that not only does the U.S. image appear to be deteriorating; the image of democracy – the central state-building principle of the Bush administration – is suffering a similar decline. "In nearly all countries where trends are available, people are less inclined to say they like American ideas about democracy than they were in 2002, and in many countries the declines are quite large...."¹⁷ More emphatically, "Majorities or pluralities in most countries surveyed say they dislike American ideas about democracy – and this sentiment has increased in most regions since 2002." In the very region to which the great thrust of Bush's democracy agenda was aimed, the Middle East, American credibility suffered the most. "Even [Arabs] who value freedom and democracy did not want our [U.S.] assistance in promoting democracy in their country."¹⁸ Clearly something has gone very wrong.

SECTION 2: EXIGENCY OR HYPOCRISY

LOSING THE MORAL HIGH GROUND

So how did this most ironic and unexpected result come about? The most obvious and by far best known and documented factor leading to the loss of U.S. credibility is Washington's apparent selectivity in applying the principles of democracy and freedom in practice. The relentless crush of real-life international contingencies forced the Bush administration to make decisions and take actions that undercut the message it was so stridently broadcasting to the world about the primacy of democracy. Although such discrepancies between rhetoric and practice in foreign policy are practiced by all countries, it was the righteous stridency of the Bush administration's rhetoric that made the discrepancies so highly visible, and ultimately made the policy appear so hypocritical and opportunistic. As Washington Post journalist Peter Baker wrote in 2006, "In the year since Bush redefined U.S. foreign policy in his second inaugural address to make the spread of democracy the nation's primary mission, the clarion-call language has resonated in the dungeons and desolate corners of the world. But soaring rhetoric has often clashed with geopolitical reality and competing U.S. priorities."¹⁹

¹⁷ "Global Unease with Major World Powers," Pew Global Attitudes Project, 06/27/07.

¹⁸ James Zogby, President of the Arab American Institute, testimony before the House Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight and the Subcommittee on the Middle East and South Asia, 05/03/07.

¹⁹ Peter Baker, "The Realities of Exporting Democracy; A Year After Bush Recast Foreign Policy, Progress Remains Mixed," Washington Post, 01/25/06.

The international reaction to the detainment of enemy combatants in Guantanamo was an preview of what would happen to U.S. credibility regarding human rights, democracy and its “freedom agenda.” Bush administration claims that enemy combatants do not enjoy the protection of the Geneva Conventions regarding treatment of prisoners of war further undermined U.S. credibility. Notwithstanding the merits of the legal argument, the weight of international public opinion fell heavily against Washington, and against the denial of Geneva Convention standards to the prisoners detained at Guantanamo. The bitter reaction around the world against detainee treatment at Guantanamo was exacerbated when indications of torture, humiliation, disrespect, and even attempted suicides by inmates arose.

Then in spring 2004, already angry global popular opinion was inflamed further by allegations of abuse, torture, sodomy and even homicide of prisoners in Abu Ghraib prison in Iraq. The world recoiled at photographs taken inside the Abu Ghraib prison that circulated widely in the world press and via the internet, which were graphic and highly offensive not only to the global Muslim community, but to public opinion nearly everywhere. Enemies of America could not have connived to create a more effective propaganda campaign to poison global attitudes toward the U.S. than the Abu Ghraib photographs. Guantanamo and Abu Ghraib did incalculable damage to U.S. credibility. Public opinion surveys throughout the world illustrate the effect. Even among our closest allies a 2006 poll indicates, “... a dramatic deterioration in the United States’ reputation as an effective advocate of human rights in the world. Majorities in Germany (78%) and Great Britain (56%) said the U.S. government did a “bad job” of promoting human rights. Eight years ago, fewer than one in four Germans (24%) and Britons (22%) rated U.S. performance in this area as bad.”²⁰

What many throughout the world interpreted as a betrayal of international law, humanitarian principles and acceptable human rights practices demonstrated by the revelations from Guantanamo and Abu Ghraib, was largely perceived in Washington as extraordinary measures to meet an extraordinary challenge – and specifically one emanating from the gray areas of international law. Bush was responding to an enemy with no state, no commitment of its own to human rights or humanitarian law, and one fiercely determined to inflict the maximum damage on the U.S. But its legalistic reasoning fell on deaf ears as many throughout the world concluded America had abandoned human rights, democracy and the rule of law, or worse, never really believed they were inalienable rights of non-Americans.

DEMOCRACY MISBEHAVING

Given the heinousness and enormity of the 9/11 attacks, and America’s justifiable determination to prevent further attacks, extreme protective measures might almost have been forgivable to the world at large, even if not justifiable. There was after all a deep well of sympathy and well-wishing for America after the attacks. However the perceived American defiance of the rule of law and gross abuse of human rights were compounded by what seemed clearly to be hypocritical back-tracking and double standards in its commitment to democracy. The Bush team had pushed loudly and forcefully for democratic reform throughout the Middle East, with initially some of the most poignant language directed at traditional American allies, such as Egypt and Saudi Arabia. Yet when faced with the

²⁰ American and International Opinion on the Rights of Terrorism Suspects, WorldPublicOpinion.org, University of Maryland, 07/17/06.

perennial choice between democracy and perceived national security and stability requirements, the Bush administration always seemed to choose national security and stability over its commitment to democracy. Such decisions contrasted starkly with what President Bush and Secretary Rice had pledged would be the new direction of U.S. foreign policy.

This tendency became painfully apparent right in the geographical crucible of the new global freedom agenda. The pointed criticism of Mubarak's Egypt implicit in Bush's speech at the NED, where in 2003 he said, "...Egypt ... now should show the way toward democracy in the Middle East,"²¹ gave way to silent acceptance when Muslim Brotherhood leaders were repeatedly detained and imprisoned. At the American University of Cairo in June, 2005, Rice boldly declared that, "The day must come when the rule of law replaces emergency decrees -- and when the independent judiciary replaces arbitrary justice... The Egyptian Government must fulfill the promise it has made to its people -- and to the entire world -- by giving its citizens the freedom to choose."²² But when significant Muslim Brotherhood gains in the November and December 2005 parliamentary polls were followed by ever higher levels of official harassment, detentions, and other heavy-handed actions, Rice was more accommodating to the Egyptian regime, focusing instead on the importance of the U.S. – Egyptian strategic relationship.

It was the dramatic victory of Hamas in the Palestinian Legislative Council election of January 25, 2006 that posed the greatest test of the U.S. commitment to democracy. Having urged key regional leaders to support the poll, the U.S. administration invested nearly \$2 million to support Fatah and deny victory to Hamas, an organization labeled by the State Department as a terrorist organization. When the results became clear – Hamas took 76 of the 132 seats – the U.S. immediately began to distance itself from the outcome, and from the victorious Hamas government. Indeed the U.S. urged and led an international embargo of the Hamas government effectively starving both Hamas and the Palestinian people of much needed revenues and other support.

The Bush administration clearly expected outcomes like those in Georgia and Ukraine, where western and U.S. supported opposition groups gained power in the 2003 Rose Revolution and the 2004 Orange Revolution respectively. Democratic processes in the Middle East however failed to behave, yielding results that were not only unexpected, but considered politically unacceptable. In the words of one commentator;

“...while Arabs were ready for democracy, the United States most certainly was not... When Islamist groups throughout the region began making impressive gains at the ballot box, particularly in Egypt and in the Palestinian territories, the Bush Administration stumbled... Friendly dictators once again became an invaluable resource for an administration that found itself increasingly embattled both at home and abroad. “

“America's post-September 11 project to promote democracy in the Middle East has proven a spectacular failure. Today, Arab autocrats are as emboldened as ever. Egypt, Jordan, Tunisia, and others are backsliding on reform. Opposition forces are being crushed.”²³

²¹ George W. Bush at NED, 11/06/03

²² Condoleezza Rice at the American University in Cairo, Egypt, 06/20/05.

²³ Shadi Hamid, Democracy Journal, Summer 2007.

As the Bush administration began to curb its enthusiasm for democracy in the Middle East, so did it also in other regions. There was little serious criticism and no significant consequences when in 2005, Ugandan President Museveni changed the Ugandan constitution to permit himself a third term, nor when his main opponent, the leader of the opposition party Forum for Democratic Change, Kizza Besigye was arrested on November 14, 2005 on allegations of treason, concealment of treason, and rape. Uganda was far too important an African ally in the War on Terror and far too important an example of successful African development to sacrifice. In Asia unwavering American support for Pakistan's President Musharraf is but the latest example of choosing an ally in the War on Terror and a military ruler over the uncertainties of potentially misbehaving democracy.

Most recently the tacit endorsement of Musharraf by senior Bush administration officials is reflected in the tolerance shown for his dismissal of up to 60 senior Pakistani judges in November 2007, in a bid to prevent the judiciary from challenging the constitutionality of his election to the Presidency. In an ironic twist of fate, it was that very act which sparked Pakistan's most recent pro-democracy surge. Notwithstanding enjoinders that Musharraf not overly manipulate the recent legislative elections, no senior member of the U.S. foreign policy or national security team called for the restoration of the jurists, or defended the independence of the judiciary from Musharraf's assault. In what can only be interpreted as a popular indictment and rebuke of U.S. policy, upon the recent release of Chief Justice Chaudhry, Ali Sajid, a university professor voiced a commonly held sentiment when he said, "We are excited that the judiciary is free and has been released from the clutches of the United States of America."²⁴

Meanwhile criticism of Cuba's, Venezuela's, Iran's and North Korea's authoritarianism is relentless. It should not come as a surprise then that many throughout the world view Washington's commitment to democracy with cynicism. Whatever the Bush administration has claimed, the message that many have heard is Washington supports democracy when it behaves, when it is convenient, when it results in the victory of those favored by the U.S., and when it does not impede the extreme preventative measures required to prevent further attacks on Americans or on U.S. soil.

SECTION 3: TECHNICAL PROBLEMS: WHAT WE DON'T KNOW

THE RULE OF LAW

In the two cases where U.S. commitment to building democracy was arguably unequivocal, Afghanistan and Iraq, despite the investment of significant resources in blood and treasure,

²⁴ Quoted in "Pakistan Premier Frees Judges; Leader's First Step Defies Musharraf", By Candace Rondeaux, Washington Post Foreign Service, Tuesday, March 25, 2008; Page A01.

the goal of democracy has proven elusive. The development of a comprehensive democracy building program is a multi-faceted and extremely complex effort, comprising elections, political parties and processes, civil society, organized labor, media, both local and national governance, legislative and executive institutions, as well as the rule of law and the justice system. In this section I will discuss only the efforts in Afghanistan and Iraq to establish justice systems based on the rule of law, which are considered necessary institutional anchors for the protection of human rights, the enumeration and separation of powers, judicial independence and checks and balances appropriate in a democratic society. I focus on the justice sector and the rule of law because it is that dimension of state-building and democracy promotion that in both countries has proven most problematic.

The traditional method of establishing social, economic and political predictability, fairness and equity in a developing polity is based on a political economy approach to institution building in the justice sector. That is, an analysis of the significant “players” populating the sector, their respective interests, capacities and dispositions, and the incentive/disincentive structures that govern their behavior. The sector, broadly conceived, includes the criminal justice system of police, judiciary, bar and penal/correctional institutions, and legal educational organizations, in addition to a variety of non-governmental and other governmental organizations (such as legislative committees, administrative law institutions, security forces, ministries of justice and interior, etc.)²⁵ A World Bank paper defines the justice sector as, “The institutions that are central to resolving conflicts arising over alleged violations or different interpretations of the rules that societies create to govern members’ behavior; and that, as a consequence, are central to strengthening the normative framework (laws and rules) that shapes public and private actions.”²⁶

Typically on-site assessment of requirements and gaps in justice systems inventories existing capacity and institutions, as well as incentives and disincentives for reform and vested interests in a potential reform process.²⁷ Participatory planning and program implementation processes are meant to establish developmental partnership between donor and host nations, encourage local ownership of the reform and development process as well as strengthen local capacity. In most developing country cases an infrastructure and tradition of justice and law exists to work with, to build upon or to reform.

Even in the less challenging environments of developing countries at peace, where national traditions and institutions exist along with substantial social capital²⁸ and human resources, the challenge of establishing the rule of law, let alone justice, is daunting. One commentator writes, “Rewriting constitutions, laws, and regulations is the easy part. Far-reaching institutional reform, also necessary, is arduous and slow. Judges, lawyers, and bureaucrats must be retrained, and fixtures like court systems, police forces, and prisons must be restructured. Citizens must be brought into the process if conceptions of law and justice are to be truly transformed.”²⁹

²⁵ For an elaborated list of justice sector components see, Equal Access to Justice and the Rule of Law, OECD/DAC, Paris, 2005 (page 3) (<http://www.oecd.org/dataoecd/26/51/35785471.pdf>).

²⁶ Justice Sector Assessments: A Handbook, Dory Reiling, Linn Hammergren, Adrian Di Giovanni, The World Bank (no date) (http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JSA_Handbook_WebEdition.pdf).

²⁷ Ibid.

²⁸ For a discussion of social capital see, Francis Fukuyama, Social Capital and Civil Society, The Institute of Public Policy, George Mason University, October 1, 1999.

²⁹ Tom Carothers, The Rule of Law Revival, Foreign Affairs, March/April, 1998.

A typical general template for establishing the rule of law and the justice sector institutions to uphold it begins with an analysis of the legal framework to ensure that the laws and regulatory environment protect human rights and are conducive to democratic practices. The institutions in place to uphold the legislative and regulatory framework are assessed and analyzed to ensure they are up to the task. These include the court system and judiciary, the correctional system, the prosecutorial authorities, and related institutions. The institutions of the justice sector should be easily and equally accessible to all petitioners (access to justice), therefore barriers to access must be carefully examined for discriminatory application. Finally an assessment of the so-called “political will” of the governing elite to take the steps (and often to make the sacrifices) necessary to accomplish successful democratic reform must be undertaken. Ideally these basic steps should be nested within some type of analytic framework which is designed to provide guidance or suggestions concerning prioritizing and sequencing developmental interventions and projects. Regrettably there is at present no widely used or accepted analytic or strategic framework to guide sequencing and prioritizing, leaving each donor agency or development organization to apply its own institutional or ad hoc strategic and analytic approaches.

Whereas the development experience of building functional justice sectors has been modestly positive in a number of states, such as post-war Germany and Japan, post-Apartheid South Africa, post-Cold War Poland, the Czech Republic and Hungary, and even such distant and unlikely places such as Mongolia³⁰, the technique to do so in failing or failed states – and especially those recovering from decades of violent conflict - is considerably less developed. The peculiar challenge of establishing the rule of law and justice in failing or failed states is that these institutions and traditions are either no longer operational, or they are of such a prejudicial character that they constitute one of the factors that has brought the state in question to the brink of failure or actual failure. Moreover those states recovering from conflict may have a severe deficit in human capacity in the justice sector. As noted in a briefing paper of the Development Advisory Council of the OECD, “Working on rule of law in conflict-affected countries will require attention to specific issues of capacity, sequencing of reforms, and trade-offs between short-term security measures and long-term reform. Challenges include how to facilitate post-conflict justice that both promotes reconciliation and prevents impunity.”³¹ It is in these areas specifically that the donor learning curve is most steep.

AFGHANISTAN

The challenge of building an Afghan justice system is epic. The country has never had effective central government possessing a monopoly of the legitimate use of force – far from it. Nor has there ever been a national justice system. In Afghanistan dispute resolution of all types has historically been the province of local shuras, using custom and tradition, and not in many cases excluding the resort to violent conflict. The country’s forbidding topography

³⁰ For a discussion of global rule of law experience development experience, see Tom Carothers, *The Rule of Law Revival*, Foreign Affairs, March/April, 1998; *Achievements in Building and Maintaining the Rule of Law*, MSI, Washington, D.C., November 2002 (http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacr220.pdf)

³¹ *Equal Access to Justice and the Rule of Law*, OECD/DAC, Paris, 2005 (<http://www.oecd.org/dataoecd/26/51/35785471.pdf>).

and heterogeneous population has resulted in socio-political fragmentation and diverse customary preferences and practices with regard to justice.

Decades of war (beginning with the Soviet invasion of 1979) decimated what infrastructure and human capacity existed. Having said that, what the coalition forces and the United Nations inherited when they assumed responsibility for state-building and democracy-building in Afghanistan was far from a blank slate to work with in developing the rule of law and a justice sector suitable for a democratic polity. “In most of Afghanistan, the rule of law has never been strong, but after 23 years of warfare, it has been displaced almost completely by the ‘rule of the gun.’ Moreover, the discontinuity of regimes over the last quarter century has resulted in a patchwork of differing and overlapping laws, elements of different types of legal systems, and an incoherent collection of law enforcement and military structures.”³² The development process initiated in 2002 would have to be overlaid on an environment in which, “regional power holders—whether they hold official positions or not—exercise political, police, and judicial authority through their control of militia forces.”³³

The so-called Bonn Agreement, dated 5 December, 2001, established the Afghan Constitution of 1964 as the interim applicable law and the basis for a new constitution. The agreement also determined that the judicial authority would be vested in the Supreme Court of Afghanistan, and that the rebuilding of the judicial system would be the responsibility of a Supreme Judicial Council.³⁴ At a donor conference in Tokyo in 2002 it was informally agreed that various sectors, or reform elements would be assigned to specific “lead donors.” According to that agreement Italy was assigned responsibility for leading the reform of the justice sector. Italy was an interesting choice for this assignment as it was not widely known as a leader in this field, and had only limited experience with justice sector reform in developing countries, let alone in a country as fragile as Afghanistan was in 2002. The U.S. assumed lead nation responsibility for the Afghanistan National Army, while Germany took responsibility for the national police, the U.K. for the counter-narcotics effort, and Japan for disarmament, de-mobilization and re-integration (DDR) of the various militias.

With virtually no current or accurate information on the Afghan justice sector available in the immediate post-Bonn period, planners had to conduct preliminary on-site investigations and inventories of the existing situation, institutional and human capacity and resources. An Italian-led multi-national assessment of the justice sector of Afghanistan in May, 2002, found that there was no repository in Afghanistan for information on law, regulations, jurisprudence, crime, the legal profession, courts, court administration, or anything else concerning the justice sector on a national level. As RAND researchers have written, “No comprehensive collection or official record of laws survived, and institutions and lawyers had little or no access to most texts.”³⁵ The physical infrastructure housing courts, police, detention and correctional capacity, legal education and training organizations, etc., was virtually non-existent.

Most critically the human resources necessary to populate an effective justice system had been decimated by the many years of anti-Soviet Jihad, internecine war, and especially Taliban fundamentalist government. As in Rwanda after the 1994 genocide, or Cambodia

³² Laurel Miller, Robert Perito, *Establishing the Rule of Law in Afghanistan*, USIP, March 2004.

³³ *ibid.*

³⁴ Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, Bonn, Germany, 12/05/02.

³⁵ Jones, Wilson, Rathmell, Riley, *Establishing Law and Order After Conflict*, RAND, 2004.

after the killing fields in 1980, there were in Afghanistan in 2002 very few professionally qualified lawyers, judges, court administrators, or other legal professionals with whom to partner in order to establish the rule of law in a working justice system. Of those legal personnel found in place, few had formal training, many came from madrassas, and most were in place due to political circumstances emanating from the prevailing power structures of their immediate geographical locale. According to an early assessment by the United Nations Development Programme, “The physical infrastructure of (the justice) institutions has been destroyed during the past decades of war and political upheaval and requires rehabilitation. In addition, and more critically, the country’s legal ‘software’ – the laws, legal decisions, legal studies, and texts of jurisprudence – are largely lost or scattered across the world.”³⁶ So, in a nutshell, what the U.S. found in 2002 was; no legal framework, no justice institutions, and minimum human capacity; and in their place a hodgepodge of traditions and customs policed by feuding warlord militias.

What were the tools available for state-building and for bringing justice and democracy to Afghanistan in 2002? When all is said and done, and the bells, lights and whistles are put aside, the basic tools of both state-building and democracy development are training, technical assistance (advice), commodities and finance. Those were the tools brought to the task of establishing justice under the rule of law in post-Taliban Afghanistan by the U.S., the UN and the international community as a whole. Accordingly substantial amounts of training, technical assistance, commodities and finance made their way to Afghanistan for the establishment of the rule of law and justice. Short and medium-term training was offered for hundreds of judges, thousands of police, and tens of thousands of Afghan military. Technical advisors were embedded in ministries, and dozens of non-governmental organizations provided technical assistance across the spectrum of justice sector areas. Expatriate legal experts from the U.S. and Italy drafted an interim code of criminal procedure. Donors refurbished physical capital, rebuilding law schools and law libraries, and provided computers, as well as needed supplies and equipment including communications equipment to the Supreme Court, the Attorney General’s Office, and the Ministry of Justice. That the various dimensions of the overall rule of law system were overseen by different lead nations was problematic and resulted in significant challenges to the sectoral coordination that experienced development professionals know is required for successful development. With the Italian government in charge of judicial training, the German government in charge of police training, the U.S. training the Afghanistan armed forces, the British in charge of the counter-narcotics effort and the Japanese managing the DDR process, no one was ultimately in charge or capable of coordinating the others. Typically major donor nations resist being coordinated, but the lead nation approach introduced a new layer of complications and is generally viewed as not having been effective.³⁷

Afghanistan was liberated from the brutal repression of the Taliban in short order, and al-Qaeda was decimated. Heroic efforts were undertaken to reconstitute Afghanistan as a democratic republic with the invocation of a constitutional Loya Jirga followed by national elections for a legislature and a president. Those participatory processes bought needed time. But the promise of democracy in Afghanistan, and the hope for a better future, has not been fulfilled. In fact most trends reflecting the development of the justice sector and the establishment of the rule of law are negative. A 2004 public opinion survey in Afghanistan

³⁶ UNDP, *Rebuilding the Justice Sector of Afghanistan*, January 2003, cited in Jones, Wilson, Rathmell, Riley, *Establishing Law and Order After Conflict*, RAND, 2004.

³⁷ Laurel Miller, Robert Perito, *Establishing the Rule of Law in Afghanistan*, page 15, USIP, March 2004.

indicated that disarming and bringing to justice the warlords and ethnic commanders who terrorized the country in previous decades should have been an immediate priority for the new Afghan government and the international community.³⁸ The U.S. and Afghanistan's neighbors however not only left many warlords and militias intact and in place, but in some cases strengthened them by providing arms, funds, equipment and political support to bolster their own parochial interests, or in the case of the U.S. in support of Operation Enduring Freedom. Some of those warlords are accused of heinous brutality in the pre-Taliban period and beyond. For example Abdel Rashid Dostum, one of the most notorious of the Afghan warlords, is believed to be responsible for the deaths by suffocation of hundreds of prisoners taken in the Kunduz in November 2001. Thousands of Dostum's prisoners were transported in airless railcars where the temperatures rose so high that many expired from the heat and lack of oxygen. When they screamed for mercy and air, Dostum's men fired at the railcars, in order "to let air in." When the perpetrator of such acts of wanton brutality was made a senior government official in the Karzai government, it was hard for ordinary Afghans to reconcile with any concept of justice. Life by some measures may be better than it was under Taliban rule, but all in all, Afghans do not appear to feel that justice has prevailed, or have confidence that Afghanistan is on a democratic trajectory.

IRAQ

While the circumstances of Iraq are unique, due both to Iraq's recent history of brutal dictatorship and to the U.S. invasion and occupation, there were certain important similarities with Afghanistan. The establishment of a democratic state in Iraq is what emerged as the Bush administration's main objective once it became clear that the weapons of mass destruction alleged by Bush to justify the invasion were nowhere to be found. And in the absence of WMD, and no clear linkages between the Hussein regime and al-Qaeda, the accomplishment of this remaining objective became especially critical. The Coalition Provisional Authority seized the democratization challenge by supporting political parties and organizing national elections. Once again however as in Afghanistan justice and the rule of law were the poor cousins in the family of democratic principles.

It now appears clear that senior U.S. reconstruction officials were quite unprepared for what awaited them in Iraq. Few in the U.S. government had a clear sense of the kind of regime Saddam Hussein had imposed for decades on his country, other than that it was bad. In their defense, the depths of the regime's depravity are hard to imagine. "The system functions like a concentration camp: inmates are played off against one another (enemies are invented) and children are tortured (for a 'higher' purpose) as the whole thing spins wildly out of control in a closed world all of its own making. This is the peculiarity of violence in Iraq and the reason for its seemingly detached 'kafkaesque' nature."³⁹ The absolute dictatorship of Hussein's Ba'ath Party took a devastating psycho-social toll on Iraqis as individuals, as well as on their social capital and political capacity. "The real experience of politics in a country like Iraq over the last quarter century has so degraded the language of public discourse that the whole population, including those in opposition, lack the barest rudiments of a conceptual apparatus with which to comprehend their reality (to say nothing

³⁸ International Republican Institute, Afghanistan Election Day Survey, 10/9/04, quoted in Jones, Wilson, Rathmell, Riley, Rand, 2004.

³⁹ Samir al-Khalil, Republic of Fear, Pantheon, New York, 1989 (xvii).

of formulating a happier alternative to it).⁴⁰ “Fear is the cement that holds together this strange body politic in Iraq. All forms of organization not directly controlled by the party have been wiped out. The public is atomized and broken up...” Individuals were systematically terrorized by a fear, “that comes not only from what the neighbors might say, but that makes people careful of what they say in front of their children.”⁴¹ This was a land in which fear, mistrust and betrayal were the prominent features of social life – where children informed on their parents brothers and sisters informed on each other, and people kept the lowest possible profile as anything could result in harassment, rape, or even murder by the state security apparatus.

With that as a general social backdrop, what the occupiers found in Iraq by way of a justice system to support the rule of law and democracy was merely reminiscent of a justice system. Like most state institutions Iraq’s courts and justice sector facilities were looted and vandalized in the immediate aftermath of the fall of the Hussein regime. The Coalition Provisional Authority found that 80% of Iraq’s 128 courthouses were unsuitable for immediate use and had to be re-built, refurbished and rehabilitated. Although Iraq has a well-established legal framework based on Ottoman, British Mandate and Civil Code traditions, the entire legal and justice system was subordinated during the Ba’ath regime to a, “pervasive security apparatus, with the primary units supervised by his (Hussein’s) youngest son, Qusai. At the same time, all state structures have been corrupted and transformed into instruments of support for one-man rule.”⁴² Over recent decades the regular judiciary was marginalized and divorced from the real issues of Iraqi life, with real adjudicative and enforcement authority assigned to, “a sophisticated structure of security services, revolutionary courts, emergency decrees, a network of informers, and the brutal crushing of dissent.”⁴³ Senior judges and justice sector officers, who if not Ba’ath Party members, were formally approved by the Party, were not exempt from the burden of pervasive fear that sat atop the entire country. The Iraqi National Police were in no better condition, and police facilities like judicial facilities were comprehensively looted in vandalized in the immediate aftermath of Hussein’s overthrow.

Nested within the overall confusion resulting from occupation, looting, and the flight of Iraqi professionals, was a general lack of clarity on what law was in force, who could and who could not enforce it, and what role would be played by Iraqis. De-Ba’athification further obfuscated roles and responsibilities. As in Afghanistan the tools available to restore – or rather create a democratic justice system were training, technical assistance, commodities and finance. Unlike Afghanistan, in Iraq there was no question of which was the lead country as the U.S. dominated all aspects of the occupation and took the lead on everything.⁴⁴ By 2004 Iraq had become without close second the top U.S. national security and foreign policy priority, so resources were available in unprecedented quantity. Literally billions of dollars worth of training, technical assistance, commodities and finance have been invested in the state-building and democratization effort in Iraq.

Once again the emphasis was placed on elections, political parties and political processes. Tremendous resources were invested in the dramatic national legislative elections of 30

⁴⁰ Ibid (p.101).

⁴¹ Ibid (p.274).

⁴² U.S. Institute for Peace, Establishing the Rule of Law in Iraq, Special Report 104, 04/03.

⁴³ Ibid.

⁴⁴ The U.N., which played such a vital role in Afghanistan, was initially excluded by the Bush administration, then unwilling to remain in Baghdad after the August 19, 2003, bombing of its headquarters which killed at least 23 people, including Sergio Vieira de Mello, the top U.N. envoy in Iraq.

January, 2005, the constitutional referendum of 15 October, 2005, and the general election of 15 December, 2005, all of which were judged by the occupation authorities and by the U.S. as credible and sufficiently democratic. The outcome of these elections is that the Iraqi executive and legislative branches of government are now composed of individuals who were elected by their constituencies, and are thus theoretically accountable to them. This is not by any means insignificant. However it is uni-dimensional, and though elections are the most visible and photogenic elements of democracy, they are possibly the easiest element to administer. The justice sector as in Afghanistan lagged dangerously behind. Security has fluctuated dramatically, improving recently as a result of the so-called surge. But it is hard to imagine that most Iraqis would not agree with Russian President Putin when he said at a G8 press conference in July, 2006, “We certainly would not want to have the same kind of democracy as they have in Iraq, quite honestly.”

By late 2007 it appeared that even Bush administration senior officials had conceded that the promise of democracy might go unfulfilled in Iraq. According to a CNN report in August, 2007, “exasperated front-line U.S. generals talk openly of non-democratic governmental alternatives.” While President Bush has never wavered in his belief that democracy is taking root in Iraq, a senior officer on the ground in Diyala, Brig. Gen. John “Mick” Bednarek, part of Task Force Lightning, said, “Democratic institutions are not necessarily the way ahead in the long-term future.”⁴⁵ In early 2008 it is an undebatable conclusion that the Bush administration has thus far failed to make Iraq into a sustainable democratic state. This failure, along with the terrible suffering of the Iraqi population since 2003, has brought discredit to the U.S., and perhaps irreparably damaged its reputation as the world’s champion of democracy.

TECHNICAL GAPS

Much is still unknown about state-building, democratization and the rule of law. The record of the “practitioners” in this field is uneven and inconclusive for the most part. There have certainly been modest successes in a range of countries in diverse settings and in all regions. The rule of law and democratic government have become established throughout most of Latin America, marking dramatic progress since the violence-torn 1980s and 1990s. Many of the formerly communist East European states have successfully transitioned to democratic polities under the rule of law. Asia also has its share of success stories, including the more consolidated democracies of Japan, South Korea, and Taiwan, and the more recently established democracies of Mongolia, Philippines and Indonesia. Africa has proven a greater challenge to state-builders and to democracy, yet the record is not totally of failure. South Africa overcame its bitter history of apartheid to establish a credible democratic polity, though rule of law is not fully established there. Mozambique, Mali and Botswana represent additional modest successes for democracy and the rule of law. Certain kinds of states however clearly pose more intractable challenges – particularly what are referred to as failing or failed states.

Afghanistan and Iraq are such states, and in both Afghanistan and Iraq it is clear that the U.S. and the international community lack critical technical approaches and capacities. In

⁴⁵ CNN, “U.S. officials rethink hopes for Iraq democracy”, 08/22/07.

both cases there was no strategic framework to guide would-be state-builders in prioritizing and sequencing interventions in the justice sector, and in establishing the rule of law. Both countries at the time of occupation were effectively dysfunctional as polities, having failed due to military defeat followed by occupation. In both cases the justice systems that preceded invasion were grotesquely detrimental to the development of a modern democratic polity. The templates developed in such countries as South Africa, El Salvador, Poland, or Thailand are inapplicable in such devastated environments as Afghanistan or Iraq. There was no clear doctrine guiding the trade-offs between short-term and long-term development, between security and justice, between central and regional orientations, between accountability for past crimes and reconciliation, or between formal and informal or customary justice.

In trying to create democracy in the difficult climate of Afghanistan and Iraq U.S. planners found that deficits in the formal justice system were insurmountable in the short-term. Moreover, it did not take long to realize that the formal justice systems of both countries did not represent the retail level of legal interaction, where the vast majority of Afghans and Iraqis seek justice. For the most part, due to corruption, state malignity, or merely cultural preference, Afghans and Iraqis tend to seek justice from traditional or customary institutions. And these represent an area of technical knowledge where very few if any donor agencies have expertise. In many places the practices of traditional justice, which may legitimize vendetta, revenge, blood money, harsh gender discrimination, even female genital mutilation, are inconsistent with the rule of law in a modern democracy. But how can the cultural capital embedded within traditional systems be captured in a state-building process or in the process of democratization? This is largely unexplored territory.

The building or re-building of justice systems on a nation-wide scale is another area of uncertainty. The legal system and the institutions that uphold it, touch upon every aspect of life for citizens, with impact on business and commerce, family life, inter and intra-community relations, and of course politics. Fukuyama notes that, “establishing a rule of law involves extensive construction not just of laws but also of courts, judges, a bar, and enforcement mechanisms across the entire country. Putting such a system into place is one of the most complex administrative tasks that state-builders need to accomplish.” In his terms the justice system has a very broad mandate, and is transaction-intensive, responsible for a multitude of large and small roles that play a significant part in everyday life. He explains that institutions with a narrow mandates, and few transactions, such as central banks, are easier to develop.⁴⁶ In conditions where the inherited system provides little if anything to build on, such as in failing or failed states, this challenge is highly ambitious, and one for which neither the U.S. nor the international community have adequate tools. No conceptual or strategic framework currently exists for the establishment and development of a justice sector on a national scale that would guide prioritization and sequencing of efforts, and without which, the process is inevitably ad hoc and haphazard.

The absence of human capital is often the most vexing challenge to meet. As in Cambodia following the Khmer Rouge genocide, Afghanistan and Iraq suffered nearly catastrophic deficits of trained, qualified and capable officials to populate new or re-built justice systems. The development profession’s dependence on training and education, while indispensable in many instances, cannot provide the needed expertise on the ground in the short-term when it is vital to jump-start the state-building process. Short-term training is

⁴⁶ Francis Fukuyama, *State-Building: Governance and World Order in the 21st Century*, Cornell University Press, New York, 2004.

helpful in upgrading skills, but it cannot change organizational cultures or overcome psychological dispositions that have matured over years or even decades. To compensate for the lack of qualified local human resources, the international community has relied upon the technical assistance of a large but loose cadre of expatriate consultants who have substantive expertise and experience in such places as Rwanda, Bosnia, East Timor, etc. But this is inevitably haphazard and unreliable. It is widely acknowledged that the human resource gap in post-conflict situations is a serious challenge that must be addressed on an urgent basis, if possible during the so-called “golden hour.” “In his pre-departure press conference on December 17, 2000, Bernard Kouchner, the senior UN official in Kosovo, said the lesson of Kosovo was that peacekeeping missions need to arrive with a law-and-order kit made up of trained police, judges, and prosecutors and a set of draconian security laws. This is the only way to stop criminal behavior from flourishing in a post-war vacuum of authority”⁴⁷ Recently there has been a call in the U.S. for a “civilian response corps” of non-military professionals who could be deployed at short notice to conduct reconstruction and stabilization operations in fragile, failing and failed states. However until such a capacity exists the U.S. and its international partners will have to continue to rely on reluctant and costly military forces, and the unorganized international army of expatriate civilian consultants and contractors to fill as best they can the severe gaps in human resources typical of fragile, failing and failed states.

Both Afghanistan and Iraq suffered tragic and brutal insecurity and conflict for protracted periods of time - decades – prior to their respective “liberations” by American forces. The extreme fragmentation of Afghanistan resulted in fratricidal tribal and ethnic conflict that simmered under the Soviet occupation, and erupted in the post-Soviet period. In Iraq the entire country suffocated under the dictatorship of Hussein and the Ba’ath Party, and when these were deposed, the built-up pressure was bound to explode. In both countries grievances were pervasive and profound, with credible allegations of widespread war crimes and crimes against humanity. In the 1990s the international community explored a range of concepts and developed formal institutions to cope with both the legal and the psycho-social strains related to national healing in post-conflict environments. These are commonly referred to under the rubric of transitional justice, which seeks both to establish accountability for brutal crimes committed in the past while also encouraging the reconciliation necessary to move forward into the future. The tribunals established for war crimes and crimes against humanity in the former Yugoslavia and Rwanda (ICTY and ICTR respectively), as well as the Special Court for Sierra Leone (SCSL) have begun to break the cycle of impunity and immunity that has enabled murderous leaders throughout the world to escape accountability for their acts. Yet deemed by many senior officials in the Bush administration to be too expensive and too time-consuming, no interest was shown in setting up international tribunals for the crimes committed by the Hussein regime in Iraq, or by the Taleban and the various warlords of Afghanistan. Nor in either case was there any serious support for “truth and reconciliation” processes or institutions, such as that which helped South Africa reconcile with its apartheid past.

In Rwanda the government, having grown impatient with the inability of the international community to propose viable solutions to its problems of transitional justice, took matters into its own hands. After waiting seven years for western government experts and consultants to provide a solution to the cases of over 100,000 Rwandans accused of taking part in the 1994 genocide the Rwandan government introduced an innovative adjudicative process called “gacaca.” The gacaca courts applied community justice based on traditional

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R. Jeffrey Smith, “Kosovo Still Seethes as UN Official Nears Exit,” Washington Post, 12/18/ 2000.

practices that are familiar to Rwandans and don't have the stringent procedural requirements of formal judicial justice.⁴⁸ The point is Rwandans came up with a solution to their transitional justice predicament that was beyond the innovative capacity of western development professionals.

Above all the Bush administration, the international community and the development profession all lack any technique for establishing or re-establishing social capital, the commodity most conspicuously lacking, yet most desperately needed in the state-building process. States like Iraq and Afghanistan, Bosnia, East Timor and Somalia have all suffered a devastating decomposition of the social fabric that holds communities and ultimately states together. Whether the process of decomposition has unfolded over years or generations there is no known process or technique for re-composing the social fabric. How can we cultivate trust between families whose members have tortured, raped or murdered each other, sometimes for years, decades or even generations? We lack effective techniques for catalyzing cooperative associational behavior whereby autonomous groups of citizens, from different clans, tribes, ethnicities or religions overcome their violent conflicts and work side-by-side for a greater public good. The tradition of public service upon which successful states rely for their core administrative functions is not available to tap in failing and failed states, and no techniques are known to instill an altruistic commitment to the common good and the state within the mindset of local leaders. We do know that there is no substitute for time, and that socio-political bonding agents require years if not decades to set. Yet the international community generally, and the Bush administration in particular lack the patience necessary for the establishment of democracy and the rule of law, let alone the building of sustainable states. These tasks require a sustained commitment and financial, technical and political support, along with the political willingness to accept sustained high costs and outcomes that might be disagreeable to us.

In summary, the problem of state-building and democratization in failing and failed states, such as Iraq and Afghanistan, can be described as a "wicked problem," characterized by elusive problem definition, ambiguous goal formation, under-developed technical approaches and inadequate systems for measuring progress.⁴⁹ It has proven extremely difficult for development planners generally, and for the Bush administration specifically to fully appreciate the magnitude of the challenge, and in the cases of Afghanistan and Iraq, this failure has cost the U.S. dearly in terms of credibility as a global protagonist for democracy.

SECTION 4: JUSTICE, THE MISSING COMPONENT

In the President's introduction to the National Security Strategy of the United States, published in 2002 Bush stated clearly his view of the universality and nature of democracy;

"The great struggles of the twentieth century between liberty and totalitarianism ended with a decisive victory for the forces of freedom—and a

⁴⁸ Gacaca is a uniquely Rwandan solution to post-conflict reconciliation, adopting a traditional, community-based process to the challenge of dealing with massive numbers of Rwandans accused of participating in the genocide, and waiting in degrading and deplorable conditions inside Rwandan prisons for years. Gacaca while not available for the architects and leaders of the genocide, allows communities to confront lower ranking genocidaires and impose penalties to compensate victims and serve the community.

⁴⁹ Horst Rittel, Melvin Webber, "Dilemmas in a General Theory of Planning," *Policy Sciences* 4, 1973.

single sustainable model for national success: freedom, democracy, and free enterprise. In the twenty-first century, only nations that share a commitment to protecting basic human rights and guaranteeing political and economic freedom will be able to unleash the potential of their people and assure their future prosperity. People everywhere want to be able to speak freely; choose who will govern them; worship as they please; educate their children—male and female; own property; and enjoy the benefits of their labor. These values of freedom are right and true for every person, in every society—and the duty of protecting these values against their enemies is the common calling of freedom-loving people across the globe and across the ages.”⁵⁰

This is a very self-centered construction. Conspicuously absent is any mention of justice or the role of justice in democracy. The conception of democracy that lies at the heart of George W. Bush’s state-building and democracy-building mission is one that resonates loudly in the U.S., but it is not the only conception of democracy. The U.S. is a country integrated by language, telecommunication and transportation infrastructure, religion, and political values. While some of these integrating factors may be in flux, the fact that many in the world find it difficult to distinguish ideologically between the two main American political parties attests to a certain degree of homogeneity within the U.S. The U.S. has relatively effective dispute resolution institutions as well as competent professional law enforcement. The state’s monopoly on the legitimate use of force is, with the caveat of the peculiarities of the 2nd Amendment, largely accepted. Social capital is plentiful, even if some of us are bowling alone.⁵¹

The social contract that has emerged in America over the centuries is built upon a very deeply rooted belief in small government. The bounty of the land and abundant economic opportunity have made self-reliance an attainable goal for many Americans. In such an environment and with such a history it is not surprising that Bush’s conception of democracy emphasizes freedom and liberty. The assumption that justice will follow inevitably from freedom and liberty is part of the conception. This has driven the development of a specific model of democracy that guides and constrains America’s ability in democracy-building today. Indeed a consensus view of democracy has emerged in Washington over the years, more in practice than in doctrine, of the essence of democracy and democratic development. That essence emphasizes the centrality of elections and electoral processes that must be relatively credible, a degree of press freedom particularly during elections, limited freedom of association and speech, and some level of domestic orderliness. While other elements such as religious freedom and freedom to organize politically are periodically invoked, this Washington consensus on democracy and democratization is a narrow conception. Bush administration officials have made it clear by their endorsement of Musharraf’s limited and generally self-serving gestures that judicial independence is not a requirement, nor justice. While the U.S. government is the primary purveyor of this view, its influence on non-governmental organizations which depend on it for their funds and programs, and other assistance organizations both foreign and domestic is substantial. While many may have reservations about this narrow Washington consensus, few are those willing to forsake the U.S. government funding, or take on the American diplomatic goliath.

⁵⁰ George W. Bush, Introduction to the National Security Strategy of the United States, 09/17/02.

⁵¹ Robert D. Putnam, Bowling Alone: Americas Declining Social Capital, *Journal of Democracy* 6:1, Jan 1995 (pps 65-78).

The Washington consensus on democracy includes a correspondingly narrow conception of the rule of law. This is referred to by scholars as the “thin” rule of law. With emphasis on procedural aspects of the implementation of law, the thin rule of law emphasizes, “the primary value of the rule of law – the essence of what it does – is to provide predictability, thereby allowing people to plan, and that this is highly valued because it enhances individual autonomy. Above all the rule of law is about legal liberty.”⁵²

While this conception of democracy and the rule of law is not unique to President Bush or to America, and has great evocative power, it is not universal. In many countries and regions the possibility of self-reliance is much less real, and therefore popular expectations of government are considerably greater. The notion of an invisible hand residing phantom-like within the network-intensive system of a free market place is no more believable in many developing countries than their spiritual beliefs, even less their superstitions are to westerners. One of the main attractions of government of the people, by the people and for the people in developing countries is the promise of the justice and the equality from which they have been historically deprived. And their expectations of democratic government include the expectation that government will help them realize that promise.

It has not gone unnoticed throughout the world that the rapid liberalization of markets and political transitions in the name of democracy have often brought power and prosperity to select elite groups, in some cases consisting of many of the same people and groups who enjoyed power and prosperity under the old regime. The wholesale privatization programs associated with the Washington Consensus on macroeconomic stabilization and management have created elite wealthy classes in most of the former Soviet territories (most notably Russia), as well as throughout Asia and Africa. Indeed those who wage war against the U.S. and its democracy agenda today “fear that the freedom so loudly championed by the United States translates in practice into a license for the rich and the powerful to take advantage of the poor and the weak.”⁵³

Recently some leading economists and development organizations have identified the wealth gap both within and between countries as the greatest threat to peace and a prosperous future. This idea has long resonated in parts of the developing world. Many developing countries emerged as states out of the crucible of idealism in the mid-20th century which gave birth to de-colonization, the United Nations with its hopeful Charter, the Universal Declaration of Human Rights and the various covenants and conventions which articulated global hopes for a new and more just, humane and peaceful international system. The heady idealism underpinning these hopes and creating a global development movement in the mid-20th century, while respectful of democracy and good governance, had an equally strong allegiance to a profoundly felt need for justice. This deeper notion of justice was summed up at a meeting of the International Commission of Jurists in 1959; it is “concerned with the establishment by the state of social, economic, education and cultural conditions under which man’s legitimate aspirations and dignity may be realized.”⁵⁴ One scholar explains that, “Under this conception, the rule of law imposes upon the government a duty to make life better for people, to enhance the circumstances of their existence, including insuring a measure of distributive justice.”⁵⁵ It was and remains the expectation of many, particularly in the developing world, that democratic government would bring with it justice and a better

⁵² Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge, 2004.

⁵³ George Perkovich, *Giving Justice Its Due*, *Foreign Affairs*, July-August, 2005.

⁵⁴ International Commission of Jurists, *Conference Report, 1959*(quoted in Tamanaha, 2004).

⁵⁵ Tamanaha, *op cit*

deal in life, along with freedom and liberty.⁵⁶ Implicit (and in some cases explicit) in this broader construction is that the gap in opportunity, wealth, living standards, and consumption between the poor and the rich should not be as staggering as it is today.

Instead of being associated with the emergence of democracy in the world today the U.S. is much more closely associated with the growing gaps between the privileged and the unprivileged. It is tarred by its support for unjust and illegitimate regimes such as those ruling Egypt, Saudi Arabia, Pakistan, and illegitimate occupations such as the Israeli occupation of the Palestinian lands. Its record of international behavior is severely tarnished, rightfully or wrongly, by the abuses of Abu Ghraib and the detainee interrogation practices in Guantanamo. The Bush administration's intuitive distrust of international organizations and laws, as symbolized by its rejection of the Kyoto Protocol, its equivocation over the Geneva Conventions and its opposition to the Rome Statute of the International Criminal Court seem to have put it on the wrong side of justice in international eyes. The seemingly vindictive application of economic sanctions against states that have aroused America's ire give the impression of harming not the leaders of those recalcitrant states, but the people; for example the people of Cuba, Iran, and Zimbabwe today – the people of South Africa yesterday.

In the immediate aftermath of 9/11 the whole world grieved with America, and offered its sympathy. With these global reservoirs of affection for America while it was still unquestionably the only remaining superpower in the post-Cold War world, the U.S. was in an extraordinary position of potential global influence. George Perkovich of the Carnegie Endowment for International Peace wrote in 2005 that, "If the United States fails to train itself on alleviating injustice as much as on expanding freedom, the political-economic order of free-market individualism it promotes will be discredited and U.S. influence will wane."⁵⁷ Less than three years later, with global reservoirs of affection for the U.S. now largely dried up, and the true power of the world's remaining superpower shown to be less shocking and awesome than previously believed, this prediction seems prophetic. Ironically while betting the house on the inevitable success of his democracy agenda, it is as likely as not that the abject failure of this agenda will be Bush's enduring legacy, and that the mission to establish a global system of democratic states will be set back substantially, and a historically unprecedented and perhaps once in generations opportunity that post Cold War American had will be lost.

SECTION 5: THE WAY AHEAD

The conclusion to be drawn from this argument is not that our efforts to help build stable democratic states should be abandoned. On the contrary. Every strategic challenge the U.S. faces today is exacerbated by governance failures, failing and failed states throughout the world. If the great triumph of the 20th century was vanquishing the utopian ideologies (of both the socialist and the nationalist variety), the epic challenge of the 21st century is precisely the quest to build stable and successful democratic states. The question is not whether to do it, but how to do it best. The failures of the Bush administration's efforts were

⁵⁶ It is worth noting that a broader conception of democracy has adherents within the western world and even here in the U.S. American philosopher John Rawls is best known for his theory of distributive justice, and such legal scholars as Ronald Dworkin argue for elevating the principles of equality and more "just" distribution as social policies.

⁵⁷ Ibid.

not failures of intent – but failures of decision-making and judgment. None of the post 9/11 failures in democratic state building were inevitable. A different administration making different choices would likely have resulted in quite different outcomes. A future administration will have to make decisions which will determine both the viability of the democratic state-building enterprise and the credibility of the U.S. in this undertaking.

Every administration is and will be confronted with complex situations requiring difficult choices between competing national interests and between short-term and long-term costs and benefits. Despite the best of intentions, upon entering office every president finds the range of viable choices constrained. It is unlikely there will ever be a time when the national interest in democratic state-building prevails in every case. But the frequency with which any administration departs from this standard will always have a direct and proportional impact on the credibility of the U.S. as a global proponent of democratic norms and ideals, on its trustworthiness, and on its reputation as a leader toward a democratic future. If these goals are truly important and sincerely embraced, the U.S. must be willing and able to bear significant costs and make strategic compromises. The overall ledger must favor democratic state-building.

The specific challenges of building democracy in failing or failed states are daunting. However the “wickedness” of a problem is no excuse for abandoning the search for solutions. We are all fortunate that abandonment has never been an accepted response in the medical profession. Though the practice of democratic state building is in its infancy, we have certainly begun to inch our way up the learning curve and there are successes which justify hope. It is clear we need better understanding of social capital and how to cultivate it if we are to succeed in failing and failed states. What institutional and procedural interventions can be introduced in these chaotic environments to mitigate fragmentation and historical distrust? Specifically what combinations of technical assistance, training, commodities and finance governed by what objectives can reverse the strong centrifugal forces of parochial interests and self-service government that enfeeble failing and failed states.

Those serious about democratization must also examine much more carefully the concept of “political will.” The literature of democratization is replete with the centrality of political will. The term is now commonly used in the discourse on counter-terrorism and counter-insurgency. It is identified as a threshold variable in determining the relationship between the U.S. government and foreign government counterparts and other putative partners, and for developing strategies. It is typically discussed as though the partner government, or leadership, of the subject state is monolithic, and either has, or does not have political will. Analyses of political will generally seem to assume that once a determination is made, it can be treated as a constant. And yet till now no objective framework for determining its presence or magnitude has been developed or applied. The result is that major decisions regarding collaboration, information sharing, funding and planning are based almost exclusively on individual idiosyncrasy, without taking into account historical or collective experience.

Finally, addressing the growing global demand for justice will require both technical innovation and political courage. Techniques and strategies must be developed to operationalize the normative elements of the so-called “thick rule of law.” Democratic state-building is unlikely to prove sustainable so long as the efforts and benefits are so quickly captured by elites who use the latitude of liberalization to further tighten their grip on power

and wealth. We must think critically about how to forge more inclusive and enforceable social contracts between governments and the governed, to ensure that sufficient numbers buy-in to the state-building and democratization processes to give them time to consolidate and build momentum. Critics of distributive justice have good grounds for skepticism; previous efforts by states to create utopian conditions of perfect justice have led to spectacular catastrophes and tragedy; Maoist egalitarianism and the Khmer Rouge nightmare in Cambodia are merely the most egregious examples. By and large governments have rarely proven effective distributors of justice. While we must be informed by them, we cannot be deterred by past failures if we are to address this key problem of democratization in the 21st century. Justice resonates very loudly in the developing world, and in the Islamic world is considered by many a higher value than individual freedom. It is critical that we develop better and more sensitive techniques for listening to the hopes and expectations of host country populations – not just the voices of those elites that capture the development and democratization processes.

As has been widely noted of late, we are now irreversibly beyond the “unipolar moment.”⁵⁸ The unique circumstances that yielded to the U.S. a singular opportunity to dramatically extend the writ of democratic governance in the early years of the 21st century are gone, and that historical opportunity is lost. The expectations and ambitions of future American presidents and administrations must be accordingly trimmed. Nonetheless we have neither justification nor the luxury to abandon this pursuit. To do so would risk serious erosion of our national security and be tantamount to forfeiting any future claim to American’s leadership role in the world.

EDITORS’ NOTE

The paper: *Paradoxes of Democracy and Justice in the Bush Years* by Michael Miklaucic was voted the Best Paper by the participants in the Cornwallis XIII workshop. Congratulations Michael!

⁵⁸ Fareed Zakaria, “Why the United States Will Survive the Rise of the Rest”, *Foreign Affairs*, May/June 2008, Richard Haas, “U.S. Foreign Policy in an Nonpolar World, *Foreign Affairs*”, May/June 2008.