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Presidential Human Rights Talk

Margaret E. McGuinness*

In his remarks at Washburn University in Topeka, Kansas, Professor Harold Hongju Koh presented a “counter strategy” to address the rejection of international law and institutions represented by the Trump administration’s so-called “America First” foreign policy.¹ Professor Koh’s talk drew on his earlier, influential work describing how international law and norms spread between states and other transnational actors and become “internalized” in domestic law, which he dubbed “Transnational Legal Process” (“TLP”).² In addition to explaining how international law and institutions interact with domestic law and institutions and how international norms are obeyed, TLP lays out a vision of international law that is compatible with a domestic legal system that takes individual rights and democratic governance seriously. Explicitly non-statist in its view of international law, TLP nonetheless demonstrates how the U.S. government reinforces and projects domestic political values throughout the international system. Viewed through the TLP lens, U.S. human rights policy is a means of projecting U.S. values and reinforcing internationally created human rights norms.³

As Professor Koh explained in his talk, TLP recognizes the international system as composed of transnational actors—“states, municipalities, and localities of the United States; government bureaucracies; the media; courts; nongovernmental organizations (NGOs); intergovernmental organizations (IGOs); and committed individuals” who “by generating *interactions* that lead to *interpretations* of international law that become *internalized* into [U.S. law] . . . [to] create default patterns of international law-observant behavior—[which is] ‘sticky.’”⁴ President Trump’s transactional approach to foreign policy, in which international relations are nothing more than a series of bilateral “deals” through which the U.S. either “wins” or “loses,” disrupts this

* Professor of Law, St. John’s University School of Law. Thanks to Professor Craig Martin for the invitation to contribute to this discussion of Professor Harold Koh’s keynote address to the Washburn Law School, and to Claire Hillman, James Latta, Cristen Hintze and the staff of the *Washburn Law Journal* for their assistance.

1. See generally Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413 (2017).

2. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1994).

3. This is perhaps not surprising, as it reflects Professor Koh’s career as a human rights advocate, international law scholar, and policy maker promoting human rights.

4. Koh, *supra* note 1, at 414–15.

vision of TLP. Trump's "America First" foreign policy sees international relations through a darker lens, as explained by two senior officials:

*[T]he world is not a 'global community' but an arena where nations, nongovernmental actors and businesses engage and compete for advantage. We bring to this forum unmatched military, political, economic, cultural and moral strength. Rather than deny this elemental nature of international affairs, we embrace it.*⁵

This is not international relations as transnational legal process, through which all values, including those rooted in human rights and the rule of law, interact. This is international relations as transnational "Hunger Games."

Absent from this rather bleak view of the world is any long-term strategic vision for international institutional relationships of the United States, a void that is already leading to unease among U.S. partners and alarm among international law scholars and foreign policy experts.⁶ The Trump approach, and the administration's behavior to date, may signal a withdrawal from international institutions and legal commitments that, for over 70 years, have served U.S. interests while promoting and expanding the international rule of law.⁷ During his campaign, Trump questioned the wisdom and value of free trade agreements, the European Union and the NATO alliance, attacking the bipartisan foundation of American post-World War II foreign policy, while aligning his anti-internationalist approach with nationalist movements in Europe and elsewhere. Trump's withdrawal from the Transpacific Partnership ("TPP"), followed a few months later by formal withdrawal from the Paris Climate Accord, confirmed the view that his administration is, and will remain, hostile to multilateralism.⁸ This hostility

5. See H.R. McMaster & Gary D. Cohn, *America First Does Not Mean America Alone*, WALL STREET JOURNAL, 31 May 2017. This reflects Trump's own practices as a business man: self-interest and a focus on the immediate, rather than a view of building relationships (or even projects) that would require long-term relationships.

6. Jack Goldsmith recently called the Trump administration "the greatest presidential onslaught on international law and international institutions in American history," on the basis of "economic nationalism, anti-cosmopolitanism, anti-elitism, a belief that international law does not reflect American values but threatens American institutions, and a related belief that 'American peace, prestige, and prosperity were not being served by our foreign policy.'" Jack Goldsmith, *The Trump Onslaught on International Law and Institutions*, <https://www.lawfareblog.com/trump-onslaught-international-law-and-institutions> [http://perma.cc/EDD7-N4GB].

Despite some claims that this absence of strategic vision is intentional, the idea that Trump is animated by a well-crafted plan of so-called "strategic unpredictability" approaches nonsense. See Dani Nedal & Daniel Nexon, *Trump's 'Madman Theory' Isn't Strategic Unpredictability. It's Just Crazy*, FOR. POLICY, Apr. 18, 2017.

7. I say "may signal" because among the many unprecedented moves of this administration is the utter failure, six months into the administration, to articulate any comprehensive set of values, norms, or objectives of its foreign policy. Like many other aspects of the Trump administration, foreign policy seems to simply careen from one event, trip, bilateral or multilateral meeting to another in chaotic fashion. As of July 2017, neither the President nor Secretary of State had delivered a major foreign policy address or sat down for an in-depth press interview on foreign policy.

8. The North America Free Trade Agreement is now being "renegotiated" by the Trump

extends to international human rights.

The United States has long had what can best be described as an ambivalent relationship with the *legal* institutions and treaties that make up the international human rights system.⁹ The U.S. is not a party to many of the central international human rights treaties. To the few treaties it has joined, the U.S. has attached so-called reservations, understandings, and declarations (“RUDs”) that render the treaties non-binding as a matter of domestic law.¹⁰ The result is that U.S. international human rights obligations represent relatively “thin” legal and institutional commitments.

Human rights may therefore appear to be an area where the Trump administration has little work to do in dismantling U.S. obligations, as there are few obligations to dismantle.¹¹ Furthermore, even before Trump’s election, growing fractures within the human rights system including recent withdrawals of states from the International Criminal Court, coupled with reversals in democratization in places like Russia, Turkey, Venezuela, and Poland, led some scholars to argue that the global human rights era was waning.¹² Human rights advocates also expressed disappointment in what they saw as President’s Obama’s failure to improve human rights compliance and reorient U.S. human rights legal commitments.¹³ Under this account, President Trump’s actions or inactions regarding human rights may not matter because his policies will have little effect on a weakening system to which the U.S. is, for the most part, only symbolically committed.

This account misses an important dimension of U.S. engagement with international human rights: rhetorical support for an international system of states that respect human rights, accompanied by rhetorical condemnation of behavior that falls outside the norms. It is this rhetorical commitment, not membership in treaties, that has served as the core element of U.S. support for improved human rights conditions around the globe. The U.S. has long practiced a form of “exceptionalism” to any binding international human rights commitments, remaining an outsider to the formal international commitments that would subject its own domestic human rights behavior to

administration, also in fulfillment of a campaign promise to undo that trilateral trade agreement.

9. I review this ambivalence in Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT’L & COMP. L. 393 (2005).

10. *Id.* at 416.

11. The exception is the UN Human Rights Council, to which the U.S. was elected another three-year term in 2016. It is not eligible for re-election in 2019, as it has already served two consecutive terms. Even withdrawing from its current membership term would not be radically new, as the last Republican administration withdrew from the Council on the grounds that the reforms to its membership—when the Commission became the Council in 2006—did not go far enough to resolving problems with membership criteria and the politicization of the Council’s agenda.

12. See, e.g., Ingrid Wuerth, *A Global Downturn in Human Rights: Implications for International Law*, June 27, 2016, <https://www.lawfareblog.com/global-downturn-human-rights-implications-international-law> [<http://perma.cc/FFC3-6T6X>]. For the view that international human right law has failed to meet its goals, see ERIC POSNER, *TWILIGHT FOR HUMAN RIGHTS* (Oxford Univ. Press, 2015).

13. See, e.g., Kenneth Roth, *Barack Obama’s Shaky Legacy on Human Rights*, FOR. POLICY, Jan. 4, 2017 (arguing that Obama’s human rights record fell short of the goals Obama set out for his administration).

international adjudication under international rules. The “good” version of this exceptionalism sees U.S. domestic constitutional rights protections as separate and superior to international human rights law, while at the same time acknowledges that the values of international human rights law draw inspiration and influence from those same U.S. constitutional values. The “bad” version of exceptionalism uses the very separateness of U.S. constitutionalism to justify or excuse behavior that falls short of international standards.¹⁴ Over the past forty years, the U.S. has retained a remarkably consistent rhetorical commitment to the idea—and ideals—of human rights as part of its foreign policy, leaning heavily on the “good” version of exceptionalism.

This Essay provides examples of the presidential human rights talk of George W. Bush and Barack Obama to demonstrate how Donald Trump has completely abandoned the practice of human rights talk. Despite significant differences in human rights practice, illustrated, for example, by the Obama administration’s swift abandonment of the Bush-era policy that permitted torture and the use of black sites in post-9/11 terrorist operations, Bush and Obama followed a consistent rhetorical theme of human rights talk in their foreign policies. This is because, over time, presidential human rights talk has proved valuable to the U.S., and, while not sufficient to improve human rights conditions, human rights rhetoric has also proved necessary to creating the diplomatic conditions through which other, effective, measures can be taken. Other actors in the transnational legal process of human rights may step in to fill the rhetorical void left by the abandonment of presidential human rights talk. But other actors, even U.S. government actors, cannot play the unique role that a U.S. President plays on the global stage. The loss of presidential human rights talk, combined with gutting funding for programs and personnel that promote the rule of law and expansion of rights, may signal the end of “good” U.S. human rights exceptionalism.

A. The Bipartisan Tradition of Presidential Human Rights Talk

Diplomatic “human rights talk” describes public statements construed in diplomatic or official settings in which a government expresses official support for persons or groups of persons making claims to human rights, or condemns or praises the human rights behavior of particular governments or non-state actors. For the U.S., diplomatic human rights talk also encompasses U.S. government support for (and reform-minded criticism of) international governance bodies and institutions that is articulated in the language of

14. Professor Koh has distinguished between four types of American human rights exceptionalism, ranging on a scale of “ascending opprobrium”: (1) “distinctive rights,” (2) “different labels,” (3) “flying buttresses,” and (4) “double standards.” See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1483 (2003).

international human rights norms. Presidential human rights talk is a type of diplomatic human rights talk, limited to the expressions made by the President himself.

The rise of international human rights talk as a dimension of diplomacy paralleled the rise of “rights talk” domestically. But diplomatic human rights talk serves a different function within international relations from the function of “rights talk” within domestic law. Domestic “rights talk” refers to efforts to shift the public’s understanding of particular issues within society as merely political, to an understanding that those issues give rise to legal rights and legal claims.¹⁵ Similarly, in international human rights, the term “rights talk” is used to refer the ways in which groups seek to shift political claims to legal claims.¹⁶ But diplomatic human rights talk is carried out not by legal advocates, but by government officials. It is therefore not aimed at the issue of legalization of claims, or the parsing of the political and the legal, *per se*, but rather on the spreading of the ideas and values of human rights. Diplomatic human rights talk represents the shift from the internal to the international. Issues once thought to be solely within the realm of internal governance are now raised as proper subjects of international diplomacy. U.S. diplomatic human rights policy—as is the case with the human rights policies of other developed democracies—has reflected the view that proper protection of human rights, whether realized through legal or political claims, is necessary to good governance, reflects a state’s legitimacy within the international community, and will promote stability.¹⁷

As an outsider to many central international human rights legal institutions, the U.S. uses human rights talk to spread the values it sees as an essential part of a stable international order. These values reflect baseline norms that support self-governance, democracy, and the rule of law based on universally shared human rights. The U.S. has deployed human rights talk to support a variety of approaches to human rights protections, sometimes explicitly supporting international legal and institutional approaches (even those, like the International Criminal Court, in which the U.S. does not directly participate), sometimes supporting the processes of multilateral or transnational influence on practices, and sometimes providing direct unilateral

15. The movement of “rights talk” in the U.S. is one that explicitly rejected international rights instruments as the basis for its rights talk, and embraced a constitutional approach to legalization of claims. See Carol Anderson, *From Hope to Disillusion: African Americans, the United Nations, and the Struggle for Human Rights, 1944–1947*, *DIPLOMATIC HISTORY*, Vol 20, p. 531 (1996); see also, David Sloss, *THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE* (2016).

16. See e.g., Sally Engel Merry, *Rights Talk and the Experience of Law: Implementing Women’s Human Rights to Protection from Violence*, *HUMAN RIGHTS QUARTERLY*, Vol. 25, No. 2 (2003).

17. See U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *Country Reports on Human Rights Practices, Secretary’s Preface* (2015), <https://www.state.gov/j/drl/rls/hrrpt/2015humanrightsreport/index.htm#wrapper> [<http://perma.cc/LGD3-83C5>] (“The frequently grim examples detailed in this Report strengthen our resolve to promote fundamental freedoms, to support human rights defenders, and to document and promote accountability for violations of human rights. We do so because it is right and because it reinforces our interest in a more peaceful world.”)

support for groups fighting for human rights within a foreign state.¹⁸

Presidential human rights talk is but one dimension of presidential rhetoric. When the President speaks, whether domestically or internationally, his words carry great weight. When aimed at a domestic audience, presidential speech frames the possibilities of domestic policy, including shaping expectations of political audiences.¹⁹ Presidential rhetoric affects domestic constitutional values and how questions of rights will be weighed by courts.²⁰ Presidential speech also frames the contours of U.S. foreign policy, and, especially if viewed as the central voice (“sole organ”) of the U.S., on the international plane.²¹ This centralization of the rhetorical power of the United States into the office of the presidency means presidential human rights talk is more important internationally than the rhetoric of any other member of the Executive branch, Congress, or the courts. And as a result of America’s position in the world, U.S. presidential speech is generally heard the most loudly among the speech of other heads of state and government. Through the power of presidential human rights talk, the U.S. has been able to remain a leading voice on behalf of the values of international institutions in which the U.S. has itself not taken part. Since these human rights values were seen as vital to maintenance of an international order that served U.S. interests, the human rights talk in support of those values has served, over time, as a makeshift bridge over the gap in human rights legal commitments.

Examples of presidential human rights talk used during the administrations of President George W. Bush and President Barack Obama illuminate the ways in which human rights rhetoric has been used in support of the broad international order. While at first blush, these two administrations appear to have taken quite different approaches to questions of international human rights institutions and compliance, the presidential human rights talk across both administrations bears remarkable consistency.²²

18. In its most extreme form, this kind of unilateral support can result in humanitarian intervention. President Obama’s 2011 Libya intervention was one example, backed by a UN Security Council Resolution. See President Barack Obama, *Remarks by the President in Address to the Nation on Libya*, THE WHITE HOUSE (Mar. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya> [<http://perma.cc/TJ4H-XSEY>]; see also President Barack Obama, *Statement by the President on Libya*, THE WHITE HOUSE (Aug. 22, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/08/22/statement-president-libya> [<http://perma.cc/2XHT-QKTJ>].

19. See, e.g., KARLYN KOHRS CAMPBELL & KATHLEEN HALL JAMIESON, *DEEDS DONE IN WORDS: PRESIDENTIAL RHETORIC AND THE GENRES OF GOVERNANCE* (1990).

20. See Oren Gross & Fianoula Ni Aloain, *The Rhetoric of War: Words, Categorization and Conflict, Post-9/11*, 24 CORNELL J. LAW & PUB. POLICY 241 (2014) (citing sources).

21. The original use of the “sole organ” description of presidential foreign affairs powers is attributed to John Marshall, from his time as a member of Congress. See 10 ANNALS OF CONG. 613 (1800); see also 2 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 458–75.

22. I included the quotes from Obama as recent examples to illustrate the stark difference between human rights talk as recent as fall 2016, with the vacuum of human rights talk following the inauguration of Donald Trump in January 2017. The quotes from G.W. Bush come from various points in his presidency, but are intended to demonstrate the consistency of particular types of human rights talk across administrations of both parties, even where there were significant differences in approach to national security and democracy promotion issues.

These presidential statements are externally directed, in that they address human rights behavior outside the United States. However, the statements often reference internal values of the United States, including self-government, democracy, the rule of law, and individual liberty and equality. Among the examples are statements that lend rhetorical support to the values of human rights and to the governments and institutions that support those values, as well as statements that criticize and condemn behavior that falls short of human rights norms.²³ In both rhetorical support and rhetorical criticism, recent presidents explicitly link international human rights to a broader vision of U.S. foreign policy and global governance.

This example from President Obama from his address in Cairo in June 2009, lays out a new vision of governance for the Middle East:

*Each nation gives life to this principle in its own way, grounded in the traditions of its own people. America does not presume to know what is best for everyone, just as we would not presume to pick the outcome of a peaceful election. But I do have an unyielding belief that all people yearn for certain things: the ability to speak your mind and have a say in how you are governed; confidence in the rule of law and the equal administration of justice; government that is transparent and doesn't steal from the people; the freedom to live as you choose. These are not just American ideas; they are human rights. And that is why we will support them everywhere.*²⁴

The human rights theme here—the universal appeal of democracy, equality, and liberty—served as a continuing thread throughout the Obama administration, despite the failures of the Arab Spring and descent of the region into a new cycle of oppression and war in Syria. He returned to this theme in his last address to the UN General Assembly in September 2016, tying human rights to a more urgent defense of economic and political liberalism and the rule of international law in the face of populist-nationalist movements resurgent in that consequential year:

I believe that as imperfect as they are, the principles of open markets and accountable governance, of democracy and human rights and international law that we have forged remain the firmest foundation for human progress in this century. I make this argument not based on theory or ideology, but on facts—facts that all too often, we forget in the immediacy of current events. . . .

23. A more fine-grained typology would show that statements of support range from abstract, general support for international human rights, to more specific support for particular categories of rights or support for particular rights holders. Similarly, criticism can come in the form of sweeping critiques of regimes that flout the norms in human rights, to more specific criticism of particular rights practices, events of rights violations.

24. President Barack Obama, *Remarks by the President at Cairo University*, THE WHITE HOUSE (June 4, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-cairo-university-6-04-09> [<http://perma.cc/AW8L-4HSJ>].

*I believe in a liberal political order—an order built not just through elections and representative government, but also through respect for human rights and civil society, and independent judiciaries and the rule of law.*²⁵

These remarks echo those of President George W. Bush, delivered more than a decade earlier during a visit to Latvia in May, 2005:

*As in other parts of the world, the work of democracy is larger than holding a fair election; it requires building the structures that sustain freedom. Selective liberalization—the easing of oppressive laws—is progress, but it is not enough. Successful democracies that effectively protect individual rights require viable political parties, an independent judiciary, a diverse media, and limits on executive power. There is no modernization without democracy. Ultimately, human rights and human development depend on human liberty.*²⁶

One year earlier, President Bush more explicitly described human rights as a “cornerstone” of US foreign policy in remarks at the White House:

*Support for human rights is the cornerstone of American foreign policy. As a matter of national conviction, we believe that every person in every culture is meant by God to live in freedom. As a matter of national interest, we know that the spread of liberty and hope is essential to the defeat of despair and bitterness and terror. The policy of the American government is to stand for the non-negotiable demands of human dignity—the rule of law, the limits on the power of the state, free speech, freedom of worship, equal justice, respect for women, religious and ethnic tolerance, and protections for private property. That is what we believe and we're not going to change.*²⁷

In addition, both Presidents George W. Bush and Obama used foreign policy speeches to lend rhetorical support to institutions and institutional norms. In his first term, President Bush advanced the view that the United Nations served similar purposes as the central institutions of American democracy, creating a rhetorical link that he viewed as key to his agenda to reform the UN, as well as to win support of his more aggressive commitment to democracy promotion abroad, including through regime change. His remarks to the UN General Assembly in 2004 reflect this approach and connect it explicitly to the universality of human rights articulated in the United Nations Charter and Universal Declaration of Human Rights:

The United Nations and my country share the deepest commitments. Both the American Declaration of Independence and the Universal Declaration of Human Rights proclaim the equal value and dignity of every human life. That dignity is honored by the rule of law, limits on the power of the state, respect for

25. President Barack Obama, *Address to the 71st Session of the United Nations General Assembly*, THE WHITE HOUSE (Sept. 20, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/20/address-president-obama-71st-session-united-nations-general-assembly> [http://perma.cc/9HL8-5F7S].

26. President George W. Bush, *Remarks about Freedom and Democracy in Latvia*, THE WHITE HOUSE (May 7, 2005), <https://georgewbush-whitehouse.archives.gov/news/releases/2005/05/20050507-8.html> [http://perma.cc/CP4V-G7RK].

27. President George W. Bush, *Remarks on Progress in Global Efforts to Promote Women's Rights*, THE WHITE HOUSE (Mar. 12, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/03/20040312-5.html> [http://perma.cc/X773-PBZX].

women, protection of private property, free speech, equal justice, and religious tolerance. That dignity is dishonored by oppression, corruption, tyranny, bigotry, terrorism and all violence against the innocent. And both of our founding documents affirm that this bright line between justice and injustice—between right and wrong—is the same in every age, and every culture, and every nation.²⁸

Obama also addressed UN institutional norms and practices, including the need for reform, in his second address to the General Assembly in 2010:

*This institution can still play an indispensable role in the advance of human rights. It's time to welcome the efforts of U.N. Women to protect the rights of women around the globe. It's time for every member state to open its elections to international monitors and increase the U.N. Democracy Fund. It's time to reinvigorate U.N. peacekeeping, so that missions have the resources necessary to succeed, and so atrocities like sexual violence are prevented and justice is enforced—because neither dignity nor democracy can thrive without basic security. And it's time to make this institution more accountable as well, because the challenges of a new century demand new ways of serving our common interests.*²⁹

Later in his remarks, Obama made clear that this approach projects U.S. values—and, importantly, interests—to the global arena:

*The idea is a simple one—that freedom, justice and peace for the world must begin with freedom, justice, and peace in the lives of individual human beings. And for the United States, this is a matter of moral and pragmatic necessity. As Robert Kennedy said, “the individual man, the child of God, is the touchstone of value, and all society, groups, the state, exist for his benefit.” So we stand up for universal values because it's the right thing to do. But we also know from experience that those who defend these values for their people have been our closest friends and allies, while those who have denied those rights—whether terrorist groups or tyrannical governments—have chosen to be our adversaries.*³⁰

In contrast to the Trump administration practice to date, presidential criticism of rights practices in specific states were plentiful during both the Bush and Obama administrations. Presidents Bush and Obama engaged in blunt public critiques, framed as “disagreements,” often during bilateral appearances with the foreign head of state. For example, addressing rights problems in Vietnam, President Obama stated publicly during a visit to Hanoi:

Even as we make important progress in the ways that I've just described, there continue to be areas where our two governments disagree, including on

28. President George W. Bush, *Remarks to the United Nations General Assembly*, THE WHITE HOUSE (Sept. 21, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040921-3.html> [<https://perma.cc/96HR-3PZV>].

29. President Barack Obama, *Remarks to the United Nations General Assembly*, THE WHITE HOUSE (Sept. 23, 2010), <https://obamawhitehouse.archives.gov/the-press-office/2010/09/23/remarks-president-united-nations-general-assembly> [<https://perma.cc/9VWT-S2B4>].

30. *Id.*

*democracy and human rights. And I made it clear that the United States does not seek to impose our form of government on Vietnam or on any nation. We respect Vietnam's sovereignty and independence. At the same time, we will continue to speak out on behalf of human rights that we believe are universal, including freedom of speech, freedom of the press, freedom of religion and freedom of assembly. And that includes the right of citizens, through civil society, to organize and help improve their communities and their country.*³¹

President Bush similarly made public critiques during appearances at bilateral meetings, as he did in a 2006 bilateral meeting with Chinese President Hu:

*As the relationship between our two nations grows and matures, we can be candid about our disagreements. I'll continue to discuss with President Hu the importance of respecting human rights and freedoms of the Chinese people. China has become successful because the Chinese people are experiencing the freedom to buy, and to sell, and to produce—and China can grow even more successful by allowing the Chinese people the freedom to assemble, to speak freely, and to worship.*³²

These blunt assessments of human rights practices of allies and adversaries alike stand in sharp contrast to the practice of the Trump administration during the first six months. Speaking in Saudi Arabia to an audience of government leaders from around the Arab and Muslim world, including leaders of regimes with some of the worst human rights records around the globe, Trump stated:

*America is a sovereign nation and our first priority is always the safety and security of our citizens. We are not here to lecture—we are not here to tell other people how to live, what to do, who to be, or how to worship. Instead, we are here to offer partnership—based on shared interests and values—to pursue a better future for us all. Here at this summit we will discuss many interests we share together. But above all we must be united in pursuing the one goal that transcends every other consideration. That goal is to meet history's great test—to conquer extremism and vanquish the forces of terrorism.*³³

Later in the speech, he made broad references to issues that in earlier administrations would have been concretely connected to the project of universal human rights or American rights traditions and values:

31. President Barack Obama, *Remarks by President Obama and President Quang in Joint Press Conference*, THE WHITE HOUSE (May 23, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/05/23/remarks-president-obama-and-president-quang-vietnam-joint-press> [<https://perma.cc/Z9MU-ATG8>].

President Obama framed such frank talk about rights as essential to an effective bilateral dialogue. *Id.* (“We believe—and I believe—that nations are stronger and more prosperous when these universal rights are upheld, and when our two countries continue to discuss these issues as part of our human rights dialogue in a spirit of constructive and cooperative effort.”).

32. President George W. Bush, *Remarks by President Bush and President Hu of People's Republic of China at Arrival Ceremony*, THE WHITE HOUSE (Apr. 20, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/04/text/20060420.html> [<https://perma.cc/BP89-TVLN>].

33. President Donald Trump, *Speech to the Arab Islamic American Summit*, THE WHITE HOUSE (May 21, 2017), <https://www.whitehouse.gov/the-press-office/2017/05/21/president-trumps-speech-arab-islamic-american-summit> [<https://perma.cc/GJK3-9P2F>].

*That means promoting the aspirations and dreams of all citizens who seek a better life—including women, children, and followers of all faiths. Numerous Arab and Islamic scholars have eloquently argued that protecting equality strengthens Arab and Muslim communities. For many centuries, the Middle East has been home to Christians, Muslims and Jews living side-by-side. We must practice tolerance and respect for each other once again—and make this region a place where every man and woman, no matter their faith or ethnicity, can enjoy a life of dignity and hope.*³⁴

Is Trump supporting the U.S. constitutional principle of equality? Or women's rights as human rights? Is he proclaiming support for protection of minority religions as a matter of human rights and as a projection of the value the U.S. places on religious liberty?³⁵ It is difficult to discern from this text. The absence of references to U.S. constitutional values or international human rights values, leave that commitment in doubt. Taken together with Trump's statements of support and praise to leaders who engage in systematic oppression and rights abuses of their own people, it would be a stretch—at least at the time of this writing—to conclude that these words reflect any rhetorical commitment to rights in foreign relations.³⁶

B. The Role and Effect of Presidential Human Rights Talk

The human rights talk of Bush and Obama followed from a long tradition of presidential human rights talk that began in the early 20th Century, picking up momentum and running parallel to the creation and development of the modern human rights movement in the post-World-War II era. The rhetorical continuity can be seen from the post-World War I articulation of self-determination and self-governance in Woodrow Wilson's 14-points speech,³⁷ to FDR's four freedoms address,³⁸ to JFK's "Ich bin ein Berliner,"³⁹ to Ronald Reagan's "Mr. Gorbachev, tear down this wall."⁴⁰ When Louis Henkin spoke of the U.S. as serving as a "flying buttress" that supported the cause of human rights from outside the cathedral of

34. *Id.*

35. For a discussion of the tension between Saudi Arabia's poor human rights record and U.S. engagement with the Kingdom, see Peter Baker & Michael Shear, *To Trump, Human Rights Concerns are Often a Barrier to Trade*, N.Y. TIMES, May 20, 2017.

36. Among other shocking revelations, President Trump is said to have praised Philippines President Duterte in a phone call in April for his brutal and violent crackdown. Jeremy Schaihl, Alex Emmons, & Ryan Grim, *Read the Full Transcript of Trump's Call with Philippine President Rodrigo Duterte*, THE INTERCEPT (May 23, 2017, 6:23 PM), <https://theintercept.com/2017/05/23/read-the-full-transcript-of-trumps-call-with-philippine-president-rodrigo-duterte/> [<https://perma.cc/NU6R-6D8X>].

37. Woodrow Wilson, Address by the President of the United States, S. Doc. No. 5, at 104 (1917), <https://history.state.gov/milestones/1914-1920/fourteen-points> [<https://perma.cc/2NB3-4JZ9>].

38. Franklin Delano Roosevelt, 1941 State of the Union Address, <http://voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text/> [<https://perma.cc/5DY8-P4N3>] ("Four Freedoms Speech").

39. John F. Kennedy, Speech in Berlin (1963), <http://www.americanrhetoric.com/speeches/jfkberliner.html> [<https://perma.cc/ZMJ8-XBFZ>].

40. Ronald Reagan, Speech in Berlin, (1987), <https://www.archives.gov/publications/prologue/2007/summer/berlin.html> [<https://perma.cc/H77G-R4JF>].

international human rights law, he meant it as a critique.⁴¹ But the human rights talk deployed across administrations of both parties has served as a valuable rhetorical buttress to the project of international institution building that served U.S. strategic interests.

Presidential human rights talk has been supplemented by a deepening of diplomatic human rights talk within the Executive branch. Since 1977, the Executive branch has published the Annual Country Reports on Human Rights, a comprehensive report on human rights practices across the globe. This public report complies with the statutory requirement the President certify that the U.S. does not spend humanitarian or military assistance to support regimes that are abusers of human rights.⁴² Over the years, Congress's human rights mandates have expanded to include additional reporting and establishment of an extensive human rights bureaucracy.⁴³ By 2017, a number of senior-level officials and diplomats had the responsibility to monitor and report on human rights practices, including specific mandates to report on topics from women's rights to anti-Semitism and the requirement that separate reports be prepared on international religious freedom, trafficking in persons, and democracy promotion.⁴⁴ In addition to the congressionally mandated Assistant Secretary at the State Department who was in charge of a bureau dedicated to Democracy, Human Rights, and Labor, the State Department became home to over a dozen special positions at the ambassadorial level dedicated to issue-specific human rights topics.⁴⁵

Such diplomatic rights talk has been dismissed as "cheap talk" or "lip service."⁴⁶ Under this view, talk is not law, and, at best, has no effect on improving human rights practices; at worst, such lip service threatens to undermine real law in ways that might worsen human rights practices. There

41. Louis Henkin, *Rights: American and Human*, 79 COLUMBIA LAW REV. 405 (1979). Henkin lamented that the U.S. stayed "outside the cathedral of human rights," leaving its central individual rights questions of the post-War era (including civil rights, women's rights and LGBT rights, prisoner's rights, speech, religious freedom, and criminal and social justice more generally) to internal constitutional contestation and resolution.

42. The President may seek a waiver if such aid is necessary to national security. For the original provision, see 22 U.S.C. § 2151n(a) (1975) (enacted by Pub. L. 94-161, Title III § 310). This is the subject of a separate article, Margaret E. McGuinness, *Human Rights Reporting, Human Rights Law* (working paper) (on file with author).

43. *Id.*

44. *Id.*

45. The DRL Assistant Secretary position, along with most of the special envoys dedicated to human rights, remained unfilled by the Trump administration at the time of this article. See AMERICAN FOREIGN SERVICE ASS'N, SPECIAL ENVOYS, REPRESENTATIVES, AND COORDINATORS, <http://www.afsa.org/special-envoys-representatives-and-coordinators> [https://perma.cc/C9P5-4FYL]. Of the 54 special envoys listed, 16 are responsible for issues that fall within the scope of international human rights, including for envoys for anti-Semitism, women's rights, religious liberty, global criminal justice, international disability rights, LGBT issues, and trafficking in persons. *Id.*

46. Examples from the Bush administration include: Georgie Ann Geyer, *U.S. Gives Lip Service to Democracies Around the Globe*, DESERET NEWS OPINION (June 16, 2003), <https://www.deseretnews.com/article/990419/US-gives-lip-service-to-democracy-around-globe.html> [https://perma.cc/8UAB-X2VD]; From the Obama administration: Paul McGeogh, *Lip Service is All the U.S. Pays in Drive for Democracy*, SYDNEY MORNING HERALD, Feb. 21, 2011.

are three ways in which the term “lip service” is used pejoratively, as a critique of official human rights rhetoric. The first is the critique that lip service reflects a hypocrisy, wherein governments with poor human rights practices express a commitment to human rights while violating the very rights they purport to uphold.⁴⁷ The second is the double-standard critique, whereby a government expresses support for human rights, but carries out foreign and defense policies that support regimes and non-state actors that engage in gross human rights violations so long as they are deemed friendly and helpful to its economic and security interests, while only condemning and sanctioning the bad behavior of adversaries.⁴⁸ The third is a version of the “bad exceptionalism” critique wherein a government deploys the language of international human rights law to measure the compliance of foreign states, while refusing to apply those same standards to measure its own behavior.⁴⁹ At various points in the past decades, all three critiques have been leveled against the U.S.

Debates over the proper role of international human rights law and institutions in U.S. foreign policy are sometimes over-simplified as arguments between the realists, who see foreign policy as the pursuit of hard power measured in economic growth and military dominance, and the idealists, who see the goal of U.S. foreign policy as promoting U.S. values to expand democracy and human rights.⁵⁰ In practice, U.S. human rights policy has reflected a balancing of the realist and idealist views, bolstered by insights and understandings of ways in which the post-World War II legal order helps manage international politics and also the ways in which it fails, effectively, to manage politics. This balanced approach—reflecting what has been framed as an institutionalist approach international relations—grew to represent a consensus within U.S. foreign policy, even surviving the end of the Cold War. While different presidents have placed different emphases on particular aspects of the international order, U.S. commitments to international projects such as the World Trade Organization, UN, and NATO have (thus far) survived major policy failures, shifts and disruptions. Rather than see a weakening of these institutions, the end of the Cold War brought with it a deepening and broadening of them. Human rights talk grew during this period into a presidential behavioral norm that reinforced the continuity and stability of U.S. foreign policy. While the post-9/11 Bush administration detention and torture practices represented a breach of human rights norms, by the end of that presidency, practice had reverted to the norm. This

47. See Koh, *On American Exceptionalism*, *supra* note 14.

48. *Id.* at 1485.

49. *Id.* at 1525.

50. See HAROLD HONGJU KOH & OONA A. HATHAWAY, *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* (2004) (summarizing the ways in which theories of international relations have shaped the debate over how international law works).

reversion to the norm occurred, in part, because the rhetoric of rights under Bush remained a constant.⁵¹ This presidential human rights talk norm is under threat of disappearing under President Trump.

In the world of diplomacy, where it is cliché to say “words matter,” presidential human rights talk has contributed in several important ways to promoting U.S. interests in this system: reinforcing stability within the international system, particularly during times of upheaval and change; influencing and entrenching norms within international human rights institutions; embedding human rights values within the Executive branch; and bolstering domestic political support for human rights protection across the globe through engagement with civil society. Because the human rights talk of the U.S. president has these transnational effects on the formation and entrenchment of human rights norms, the president himself is a significant actor within the transnational legal process of international human rights.

The words of the U.S. president, on any subject, carry enormous weight within international politics because of the unique leadership position the U.S. has maintained since the end of World War II. Presidential human rights rhetoric has, historically, served to guide the early years of the United Nations and its human rights institutions, as well as support the creation of the European system of governance, including the Council of Europe and its human rights system. Indeed, across the globe, we can find examples of past American presidents lending rhetorical support for the values of human rights. This human rights talk is, in effect, more than rhetorical. It forms the basis of the international human rights diplomacy of the U.S., which takes place within a system of interactions—between the U.S. and international institutions, within the U.S. government, between the government and civil society, and between individual advocates across borders—that expands, deepens, and continues to influence human rights practices across the globe.

Within the U.S. government, presidential human rights talk serves as the anchor for consistent and coordinated human rights diplomacy within the Executive branch, setting a tone and outlining priorities that are carried out across the bureaucracy. It also sets a baseline for interactions with Congress on diplomatic priorities, including setting parameters of behavior of foreign states that might result in enforcement actions, such as limitations on humanitarian and military assistance or sanctions. The president’s human rights talk has historically underscored the bipartisan consensus that human rights values play a role in the annual appropriations process and that Congress has a voice in setting human rights priorities for government. It is through that process of interaction between Congress and the President that

51. I discuss this in Margaret E. McGuinness, *Old W(h)ine, Old Bottles: A Reply to Professor Paulsen*, 119 YALE L.J. ONLINE 31 (2009), <http://yalelawjournal.org/forum/old-whine-old-bottles-a-reply-to-professor-paulsen> (noting that the costs of repudiating formal rights commitments of the Torture and Geneva Conventions were high, and that the rhetorical and moral case against torture forced reversion to the norm).

differences on how the balance of U.S. constitutional and human rights values are best reflected in foreign policy typically play out. Here again, the absence of presidential human rights talk threatens to disrupt that entire process, leaving us with no firm common values on which spending and policy priorities can be debated.

Between the government and civil society, presidential human rights talk has played a dynamic role. Civil society brings attention to human rights problems and gives shape to new and emerging rights issues—at home and across the world. Interactions between the government and civil society brings those issues into the official internal discussions of the Executive branch, and can find form and expression in presidential human rights talk. Prominent examples from the Bush and Obama administrations include the issues of religious freedom and LGBT rights.⁵² In turn, civil society and individual human rights activists can be bolstered by U.S. human rights talk, as that talk plays a part in laying the groundwork for active diplomacy, political pressure, and measures to enforce behavioral expectations.

C. *The End of Presidential Human Rights Talk*

Six months into the Trump administration, it already appears that this break in the tradition of presidential human rights talk has weakened the role of human rights talk throughout the government and undermined the United States government's interactions with international institutions and civil society. Indeed, early signs from the Trump administration appeared to suggest a reckless disregard of the U.S. normative commitment to human rights. Secretary of State Rex Tillerson's decision to not participate in the March 2017 press conference accompanying the release of the Annual Country Reports was taken as the first serious disruption of the human rights talk norm.⁵³ The release of the reports had grown to be a significant event on the calendars of the senior State Department leadership in Washington and ambassadors at bilateral missions. The absence of Tillerson at the press conference, combined with his relatively tepid cover letter accompanying the transmission of the reports to Congress, appeared to be a rebuke of human rights talk.

52. The Bush administration raised international religious freedom in many high-profile foreign policy events. See Thomas F. Farr & William L. Saunders, *The Bush Administration and America's International Religious Freedom Policy*, 32 HARV. J. L. AND PUB. POLICY 949 (2009). The Obama administration included reporting on LGBT rights in the Annual Country Reports on Human Rights and also created the Office of Religion and Global Affairs in 2013. Peter Mandville, *The Case for Engaging Religion in U.S. Diplomacy*, BROOKINGS (Mar. 17, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/03/07/the-case-for-engaging-religion-in-u-s-diplomacy/> [<https://perma.cc/ZBM8-FJKX>].

53. Laura Koran, *Rex Tillerson Skips Release of Annual Human Rights Report*, CNN (Mar. 3, 2017), <http://www.cnn.com/2017/03/03/politics/rex-tillerson-state-department-human-rights-report/index.html> [<https://perma.cc/F6SW-C7NA>].

Tillerson's remarks at a May 2017 employee gathering at the State Department seemed to confirm the view that the values represented in human rights talk would not be part of the "America First" diplomacy.⁵⁴ After first noting that U.S. values of "freedom, human dignity, the way people are treated" will "guide" foreign policy, he noted that a policy that would "condition our national security efforts on someone adopting our values" would not "achieve our national security goals or our national security interests."⁵⁵ He continued, "[I]n some circumstances, if we condition too heavily that others must adopt this value that we've come to over a long history of our own, it really creates obstacles to our ability to advance our national security interests, our economic interests."⁵⁶

The remarks prompted Republican Senator John McCain to respond days later with an op-ed in strong rebuke to Tillerson, in which he laid out the case for U.S. human rights diplomacy:

I consider myself a realist. I have certainly seen my share of the world as it really is and not how I wish it would be. What I've learned is that it is foolish to view realism and idealism as incompatible or to consider our power and wealth as encumbered by the demands of justice, morality and conscience.

In the real world, as lived and experienced by real people, the demand for human rights and dignity, the longing for liberty and justice and opportunity, the hatred of oppression and corruption and cruelty is reality. By denying this experience, we deny the aspirations of billions of people, and invite their enduring resentment.⁵⁷

There are a few bright spots, which may be viewed as bureaucratic "reversion to the norm". Despite a historically slow start to staffing senior positions at the Department and a proposed budget that would sharply reduce overall staffing and programs, there are signs that normality is returning to the State Department's official human rights talk, perhaps a sign that exposure to the bureaucracy of human rights is affecting senior officials. In sharp contrast with his absence in March, Secretary Tillerson personally rolled out the Trafficking in Persons Report, another congressionally mandated State Department report, in June 2017.⁵⁸ As the Washington Post reported, as Tillerson spoke,

[Tillerson] struck themes similar to those of his immediate predecessor, John F. Kerry, saying that "the consequences of our failure to act in this area has

54. Gardiner Harris, *Tillerson: It's Time to Restore "Balance" with Other Countries*, NY TIMES, May 3, 2017.

55. Secretary Rex Tillerson, *Remarks to U.S. Dep't of State Employees*, STATE (May 3, 2017), <https://www.state.gov/secretary/remarks/2017/05/270620.html> [<https://perma.cc/YEJ8-4YJ3>].

56. *Id.*; see Ted Piccone, *Tillerson Says Goodbye to Human Rights Diplomacy*, BROOKINGS (May 5, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/05/05/tillerson-says-goodbye-to-human-rights-diplomacy/> [<https://perma.cc/AV5U-A28E>].

57. John McCain, *Why We Must Support Human Rights*, NY TIMES, May 8, 2017.

58. See Yeganeh Torbati, *U.S. Brands China as Among Worst Human Trafficking Offenders*, REUTERS, June 27, 2017.

*many other negative impacts around the world: It breeds corruption; it undermines rule of law; it erodes the core values that underpin a civil society.*⁵⁹

Even more striking, are the ways in which the bureaucracy that has been created to fulfill the aspirations of official human rights talk, appears to be influencing the statements of lower-level Trump administration appointees. One example is the official statements from State Department Spokesperson Heather Nauert.⁶⁰ A quick survey of her official Twitter account reveals that in her first three months in the position, she posted 172 tweets and 57 retweets. Twenty-two tweets and four retweets represented statements that directly criticized the human rights practices of a foreign state and/or expressed support for victims of human rights abuses. An additional nine tweets and four retweets condemned rights abuses and/or crimes of non-state actors around the world. Considering that most of the spokesperson's Twitter stream consists of factual announcements concerning meetings and travel, the tweets represent a consistent pattern of noting significant human rights events.⁶¹

Another example is U.S. Permanent Representative to the UN, Ambassador Nikki Haley, who appears to be influenced not only by the norms of the State Department officials who support her office, but also by the norms of the United Nations as an institution. On occasion, she has directly deployed human rights talk, even when it seemed out of step with the President's own remarks. On Syria, for example, she has made a series of public statements that are seeming out of step substantively with statements made by Trump and Tillerson, but are more reflective of the catastrophic human costs of the ongoing war. In a statement accompanying the release of a U.S. report on crimes of the Assad regime, she stated: "The attempt to cover-up mass murders in the Assad crematorium is reminiscent of the 20th century's worst offenses against humanity. While Assad bears the largest responsibility for his own brutality, his allies in Russia and Iran also bear heavy burdens."⁶²

There are other examples of how human rights talk shows signs of continuity within the lower levels of the Executive branch and in Congress—out of normative habit and acculturation—and demonstrate the "stickiness" that Professor Koh attributes to patterns of behavior. But the presidency matters, and statements from lower-level officials will never carry the weight

59. *Tillerson Stays Close to Trump but State Department Appears to Be Benched*, WASH. POST, July 19, 2017.

60. Nauert took over the position, which remained empty since January 20, on April 24, 2017. No tweets were issued from the spokesperson Twitter account between January 19 and April 27.

61. The survey was completed of the Twitter account "@statedeptspox" on July 20, 2017. All retweets on the account appear to be from other official U.S. Government Twitter accounts. Data on file with author.

62. Ambassador Nikki Haley, *Statements on Atrocities Committed by Assad Regime in Syria*, STATE (May 15, 2017), <https://usun.state.gov/remarks/7797> [<https://perma.cc/29EZ-BMGQ>].

of presidential statements. This may be particularly true in an administration where the president is prone to erratic and contradictory statements of policy within a short span of time. While foreign leaders have the sophistication and capacity to work around the limitations of this particular president, the failures of President Trump—in international human rights talk and in his articulation and execution of a coherent foreign policy more generally—have led to deep lamentation among U.S. allies and uncertainties around many issues.

We cannot rely on President Trump himself to revert to the bipartisan tradition of presidential human rights talk. First, so long as Trump is president, any shift towards a norm of human rights talk will be weakened by his own rhetoric—including praise for the behavior of rights-abusing foreign leaders—during the presidential campaign and his failure to engage human rights in the first months of the presidency. Second, President Trump's personal ethical problems (self-dealing, conflicts of interest, nepotism at the highest levels of government), will render him a deeply imperfect vessel for human rights talk. Third, the President's demonstrated personal dishonesty and the lingering shadow of the investigation into Russian interference into the U.S. election (on Trump's behalf) have left him personally untrustworthy inside and outside of the U.S. This untrustworthiness will have implications for U.S. credibility beyond the usual skepticism surrounding human rights "lip service." Fourth, his personal expressions of contempt for separation of powers, the independence of the judiciary, and the centrality of a free press to a democratic society are incompatible with a rights-oriented perspective that takes seriously the rule of law.

Those concerned with preserving U.S. commitment to international human rights must make do with what Professor Koh calls a "counter-strategy." As the co-equal political branch with a strong voice in foreign affairs—and the appropriations power to fund human rights bureaucracy and programs—Congress is also beginning to fill the gap. Some members of the international community are already taking their case for bolstering international norms outside the Executive branch.⁶³ We are also seeing signs—particularly in states run by Democratic governors—that engagement with human rights talk that began to take hold in states and localities during the human rights struggles of the 1980s and 1990s, will again be in vogue. States and cities have already been experimenting with independent international human rights policies, and we can expect that trend to continue and expand during the Trump administration.

Without the other elements of transnational legal process that contribute

63. See, e.g., Jennifer Steinhauer, *World Leaders Wary of Trump may have an ally in Congress*, N.Y. TIMES, (June 19, 2017) https://www.nytimes.com/2017/06/19/us/politics/world-leaders-wary-of-trump-may-have-an-ally-congress.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0 [<https://perma.cc/3CK9-33VW>].

to universal human rights protection, human rights “lip service” is not enough. The project of individual human rights is deeply integrated into the broader, lofty post-World War II international legal and institutional project to expand freedom, security and the rule of law to all people. This project is ongoing, and it is evolving and changing to reflect shifts in economic and military power, expansion of scientific knowledge, improvements in global health and well-being, and the rise of new threats to peace aided by technology. It is also under threat from the rise of nationalism and forces of nativism around the globe. As we recognize the value of TLP to understanding these trends, we should recognize that the processes that allow expansion of liberal democratic ideals across borders can also be leveraged for the expansion of *illiberal* ideas and movements. The absence of U.S. human rights talk against these illiberal forces is even more notable as a betrayal the long tradition of the U.S. to act as the rhetorical bulwark against anti-democratic and anti-human rights ideas within the international system. At a time when the liberal international order is under attack, restoration of American human rights talk feels all the more urgent.