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The Flip Side of the Record: The Commitment to Law Is Key to U.S. Legitimacy

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# The Flip Side of the Record

## The Commitment to Law Is Key to U.S. Legitimacy

*Robert W. Tucker and David C. Hendrickson*

Robert Kagan (“A Matter of Record,” January/February 2005) accuses us of contradicting our own previous writings in our essay “The Sources of American Legitimacy” (November/December 2004). Kagan claims that we intentionally distorted the historical record by asserting, among other things, that the United States pledged itself to international law in the aftermath of World War II. We reject these charges.

### **BONES TO PICK**

There appear to be three main issues in the dispute: first, how to construe a U.S. diplomatic record in which a commitment to consensual decision-making existed alongside a proclivity for unilateralism; second, how to characterize a Cold War stance in which the United States accorded the UN Security Council a marginal role

while claiming fidelity to “the principles of the UN Charter”; and third, how to reconcile the United States’ professed commitment to the rule of law with its occasional departures from legal principles.

In “The Sources of American Legitimacy,” we wrote that a pillar of U.S. legitimacy was Washington’s commitment to consensual decision-making, especially within the Western alliance. Kagan insists that we emphasized unilateralism previously and were right the first time. But Kagan himself has argued in these pages (“America’s Crisis of Legitimacy,” March/April 2004) that “during the Cold War, even a dominant United States was compelled to listen to Europe, if only because U.S. policy at the time sought above all else to protect and strengthen Europe. Today, Europe has lost much of that influence.” Apparently, then, we are in good company

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in finding a difference between the Washington that once listened to allies and the one that listens no longer. We appear also to be in good company in holding that U.S. legitimacy does have something to do with the principle of consensual decision-making, for Kagan himself advises that a greater sensitivity to allied concerns could help renew legitimacy.

The second issue concerns our treatment of the role of the United Nations in U.S. foreign policy. Kagan adduces quotations from earlier writings of ours that note that the UN Security Council played a negligible role in the nation's foreign policy during the Cold War. But he fails to point out that we wrote to the same effect in our most recent piece: "the collaborative system of decision-making envisioned by the UN Charter was an early victim of the Cold War." Kagan finds a contradiction between our earlier statements and our most recent assertion only by ignoring the relevant distinctions. In the late 1940s, U.S. leaders moved away from the system of collective security envisioned in 1945 and instead instituted regimes of collective defense, claiming that in so doing they were being faithful to the principles of the UN Charter. One may reject our belief that the United States should gain the consent of the Security Council for interventions that would otherwise be illegal, but we based that claim on the novel circumstances of the post-Cold War world—above all, the need for a constitutional check on the overweening power of the United States—and not on U.S. Cold War practice.

#### LEGAL EAGLE

The most important dispute we have with Kagan concerns the role of international

law in U.S. foreign policy. In linking legitimacy to law we did not think ourselves to be making an extraordinary claim. After all, the dictionary definition of "legitimate" is "sanctioned by law," and it seems to us that to give an account of legitimacy without reference to law is comparable to explaining the nature of virtue without reference to morality. We concede that it might be done, but we should not like to attempt it ourselves.

Kagan argues that it is "ahistorical, even fanciful" to believe that the United States pledged itself to international law after 1945. His is a startling claim that is inconsistent with the repeated declarations of U.S. statesmen. They spoke of displacing the rule of force with the rule of law, of the "sacred" character of the rule of law, of the wrong of aggression, and of the need for the peaceful settlement of disputes. Kagan writes as if our attention to these professions came about only in 2004, but that is simply not the case: see, among many instances, *The Imperial Temptation*, pages 44–45, 100, and 184–85; Tucker's *The Just War*, and Hendrickson's "The Recovery of Internationalism," in the September/October 1994 issue of *Foreign Affairs*, 31–32 and 41.

We admitted in our most recent essay that the United States occasionally violated in practice its condemnation of aggressive war and the corollary proscription against intervention. Intent on showing that in the past we held nearly the opposite view, Kagan writes that, in *The Imperial Temptation*, we argued that "U.S. foreign policy from the Truman administration to the first Bush presidency" was "a consistent 'record of departure from the first and foremost principle of world order.'" But the context from which Kagan takes this

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dressed-up quotation—which in fact was an analysis of George H.W. Bush's new world order and the central role that opposition to aggression played in his outlook—refers only to a record of departure in one region (Central America) by two administrations (Reagan in Nicaragua and Bush in Panama). We did not claim that such departures occurred everywhere and were countenanced by everybody.

The United States was undoubtedly guilty of hypocrisy in some instances. But there is a difference between conduct that generally conforms to a rule while occasionally violating it and conduct that denies the authority of the norm altogether. The hypocrisy that characterized U.S. actions helps explain why many of the interventions Kagan cites (Guatemala, Iran, and the Bay of Pigs, specifically) were undertaken secretly, just as it explains why other interventions were justified on grounds (the protection of U.S. nationals in Grenada and the defense of the Panama canal zone, for example) that did not entail the public repudiation of international law. If Kagan were correct that respect for law played little to no role in the legitimization of U.S. power in the post-World War II era, there would have been no need for such disguises. So far as legitimacy is concerned, moreover, the question is not so much whether the United States violated international law in any particular instance but whether U.S. allies saw such violations as typical or exceptional. We find peculiar the idea that these episodes, many of them inglorious and with pernicious consequences, were what inspired U.S. allies to accord legitimacy to U.S. power.

The argument in "The Sources of American Legitimacy" is not that there has never been a disparity between profession

and practice in U.S. diplomacy, but that it has never been wider than under George W. Bush. Nor is it that the supporters of the Bush administration have no precedents of illegality or unilateralism to rely on, but that no administration has brought these elements together in so alarming a way. Kagan is entitled to challenge these views, but it is spurious to claim that we fall into self-contradiction or knowingly distort the historical record by alleging them.

### **A LOSING PROPOSITION**

In the great debate sparked by the prospect of American independence from the British Empire, British statesman Edmund Burke noted, "To prove that the Americans ought not to be free, we are obliged to depreciate the value of freedom itself; and we never seem to gain a paltry advantage over them in debate, without attacking some of those principles, or deriding some of those feelings, for which our ancestors have shed their blood."

To prove that the United States ought not to respect international law, Kagan maintains that such respect is not part of the nation's record since 1945. Such advantages as Kagan has attempted to gain over us in debate come at the expense of the U.S. reputation for lawful conduct, and he seems to relish depicting the United States' post-1945 record in terms that suggest wholesale illegality. Because present trends have a way of profoundly affecting the interpretation of the past, it may be that such a view will gain in appeal, but if it does so the prospects for the restoration of U.S. legitimacy will become yet more remote. 🌐