

“the american belief in a rule of law in global context”— professor papke’s remarks at the korea military academy

Although the State of Wisconsin remains Marquette Law School’s stronghold, those associated with the school—including its alumni and faculty—have a substantial interest in the school’s growing national and even international reach. Professor David R. Papke’s invitation late last year to speak at the Korea Military Academy in Seoul is an example of this reach. Professor Papke’s speech was entitled “The American Belief in a Rule of Law in Global Context.”

A belief in the rule of law has been central in the dominant American belief system since the earliest years of the American Republic. The belief in a rule of law begins, of course, with a rejection of tyranny and an insistence that rulers should not be above the law. More concretely, the commitment to a rule of law includes a sense that law itself should be public and understandable, consistent and stable. Legal institutions such as the judiciary, courts, police, and even schools for legal education should have a pronounced degree of autonomy and be able to go about their work without concern regarding who holds political power. Courts, in particular, should be able to reach objective and fair results under the established legal standards, and, ideally, these courts should have the authority to review executive, legislative, and administrative decrees with reference to law.

No country completely measures up to this, but as early as the 1830s important observers commented on the acceptance of law and legal institutions in the United States. When the minor French aristocrat Alexis de Tocqueville toured the United States in 1831–1832, for example, he was struck by how Americans viewed the law with “a kind of parental affection.” This contrasted, in his opinion, with Europe, where the masses looked at the law with suspicion. If he were asked where one might look for America’s highest political class or most cultivated elite, de Tocqueville said, his answer would be that the obvious place was on the bench and in the bar, that is, among the

nation’s judges and lawyers. Only a few years later in time, Abraham Lincoln suggested in an address to the Young Men’s Lyceum in Springfield, Illinois, that every American should “swear by the blood of the Revolution never to violate in the least particular the laws of the country and never to tolerate their violation by others.” Let reverence for the law, he added, “become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars.”

In the decades since these statements, there have of course been episodes and eras in which one could with good reason worry that a commitment to the rule of law had been forgotten. Following World War I, for example, large numbers of foreign citizens were rounded up and deported because of their suspected leftist leanings; the roundups and deportations were directed by Attorney General A. Mitchell Palmer, the nation’s top legal official. During World War II, Japanese-Americans were summarily placed in detention camps, allegedly because they constituted a security risk. What’s more, the United States Supreme Court signed off on the detention in the notorious *Korematsu* decision. During the 1950s, as the Cold War against the Soviet Union heated up, hundreds of suspected Communists or Communist-sympathizers lost their jobs and careers without due process of law. However, in each instance, the nation purportedly righted itself by renewing its respect for the rule of law. Courts and legislatures took steps to make things right.

In the second half of the twentieth century, the commitment to a rule of law became increasingly important in American international affairs. A reigning belief system, after all, is not only a way to say who you are and what you stand for but also a way to underscore what is wrong with opponents and enemies. Hence, American spokesmen could denigrate other countries and regimes by saying they failed to respect the rule of law. ▶



Photograph from an official calendar.

The first and perhaps largest example of this tendency came during the Cold War, which pitted Americanism against Communism and divided the world from the late 1940s through the 1980s. Americans asked how they differed from Communists. What did the United States have that the Soviet Union did not? One answer was that the United States respected law and legal institutions while the Soviet Union did not. No single date marks the beginning of this characterization, but several events of the mid-1950s illustrate it well. In May 1953, the prestigious International Commission of Jurists urged American attorneys to launch a crusade against “the corruption of law for political purposes in Communist countries.” In September 1955, Harvard University held a conference on “Government Under Law,” at which several United States Supreme Court Justices reminded the assembled that a commitment to the rule of law distinguished the United States from the Soviet Union and its allies. In February 1958, President Dwight D. Eisenhower established a national holiday known as “Law Day” to honor the rule of law. “In a very real sense,” Eisenhower said, “the world no longer has a choice between force and law. If civilization is to survive, it must choose the rule of law.” The date chosen for “Law Day” was, not coincidentally, May 1, a direct

juxtaposition with the Communist celebration of May Day on the same date.

In more recent years, criticism for ignoring the rule of law has been largely directed toward countries other than the Soviet Union and its allies. Yet, there is an interesting postscript to the Cold War allegations that Communism was disrespectful of the rule of law. Contemporary American commentators sometimes express concern that Vladimir Putin, a lawyer but also the head of a former Communist country, lacks a commitment to a rule of law. Russia has a new criminal code as of 2002, one which formally recognizes the right of habeas corpus, trial by jury, and a ban on double jeopardy. But commentators still point to the biased trials of oil tycoons, the politicization of Russian courts, and—most generally—the suppression of dissenting political voices.

The chief targets of contemporary American criticism are in the Middle East, although North Korea also frequently makes the list as well. When the first President George Bush decided to launch “Desert Storm” against the Iraqis in 1991, he addressed the nation from the Oval Office and attempted to justify his decision. He championed “a new world order,” in which “the rule of law supplants the law of the jungle.” More recently, the current President George Bush pointed to three countries—Iran, Iraq, and North Korea—that constituted an “axis of evil.” How did the United States know these nations were evil? One sure sign is that they did not respect a rule of law. They were ruled by dictators or small elites, their laws were flawed, and their courts were politicized and biased.

One cure for the maladies of these three nations and for those of other rogue states in the world would be a strong dose of the rule of law, but efforts to export law and legal institutions have proven quite unsuccessful. As early as the 1960s, as part of the “Law and Modernization” or “Law and Development” movement, the United States State Department and also individual

American law schools mounted educational programs in the United States for foreign jurists and lawyers. The State Department has also run programs in foreign countries and sent teams of educators to instruct jurists and lawyers in the American view of due process. These efforts were especially prevalent during the 1990s in former Communist countries. Some of the programs, both in the United States and abroad, were sophisticated and embodied a comparative appreciation of law, but the worst of the programs were designed simply to expose foreign jurists and lawyers to the best, i.e. American, laws, legal procedures, and law-related attitudes.

We need to recognize that law and legal procedures grow in culture and history and cannot simply be transplanted from one national garden to another. The same is true for a belief in the rule of law. Most countries already have a type of belief in the rule of law, and the American view of the rule of law will not take root easily. Furthermore, most countries have ethnic, class, and religious divisions, and if one group does take the American view of the rule of law to heart, other groups are unlikely to do the same. Indeed, acceptance of the American view by one group may make the view inherently suspect for others.

Above and beyond these complications, the American commitment to a rule of law is increasingly likely to be viewed with skepticism in a global context because of developments in the United States following 9-11 and the military incursions into Afghanistan and Iraq. To invoke the agricultural metaphor one more time, transplanting the rule of law may fail not only because the new soil is unreceptive, but also because the plant is unhealthy in the first place.

Developments that suggest a lack of commitment to the rule of law are numerous. To begin with, the round-ups of hundreds of Middle Eastern and South Asian men following the destruction of the World Trade Center in New York City remind one of the Palmer raids following

World War I. In both instances, many were held in secret for months, interrogated, and subjected to closed immigration hearings. Lurking in the dragnet was a strong sense that the rule of law did not really apply to non-citizens, but if the commitment to a rule of law is a universal good, shouldn't it come into play for non-citizens as well as citizens?

The very use of the Guantánamo Bay military base at the eastern end of Cuba as the place to house detainees from Afghanistan, Iraq, and elsewhere also gives one pause. The same site had been used by the United States in the 1990s to house Haitian refugees attempting to reach American shores, but its current use is somewhat more disconcerting because administration leaders seem to have assumed that placement of the detainees offshore in Guantánamo meant due process did not have to be strictly observed. The United States Supreme Court disabused the administration of this assumption, at least to some extent, by saying that even detainees offshore in Guantánamo had a right to lawyers and a day in court.

Then, too, there is the issue of what suffices as law and as a court under the rule of law. Current American policy suggests that while American laws suffice, international law does not have to be followed, even if it is clear, consistent, and in some cases 60 years old. To cite only one example, the Organization of American States' Commission on Inter-American Human Rights insisted that the detainees at Guantánamo Bay must be accorded a formal legal status and that this would then be the basis for asserting rights in civilian court. The government said the Commission had no jurisdiction

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over the United States. In addition, the United States has assumed that military tribunals rather than domestic civilian courts would be the best courts to process the detainees. Military lawyers would argue that military justice is as thoughtful and reliable as any other. Yet we can still underscore that military tribunals are atypical when used for people other than members of the military itself. They are ad hoc and set up for special purposes. The last comparable use was in 1942 when President Roosevelt established a special military tribunal to try eight Nazi saboteurs who had sneaked into the United States.

Most troubling of all, at least in its graphic power, is the American use of torture. There are documented cases of torture being used by Americans in Afghanistan, in the Abu Ghraib prison in Iraq, and in Guantánamo Bay. Use of torture is illegal under the United States Constitution and under international law. Torture is a violation of the Convention Against Torture, a breach of the Geneva Convention, and an insult to the International Covenant on Civil and Political Rights. Torture, in short, is inconsistent with the rule of law.

One prominent American scholar—Alan Dershowitz of the Harvard Law School—has proposed a way to bring torture under the rule of law, but his proposal seems foolhardy. While not endorsing torture in and of itself, Dershowitz has suggested that those hoping to use torture go first to a court of law, make a showing that it is necessary, and then obtain a “torture warrant,” which would allow it in the specific situation. This seems likely to invite all sorts of unreliable decisions and lead, overall, to the increased use of torture.

Thoughts of Dershowitz and his torture warrant aside, the photographs from Abu Ghraib are intriguing in a cultural studies context. The photographs’ imagery and implications seem both new and old. The newness relates to their overt sexuality and, in particular, to the way women are sometimes presented as the torturers.

Even in an era during which women increasingly take on tasks previously reserved for men, one does not expect to see women demeaning prisoners and then allowing their conduct to be captured in something resembling sadistic pornography. The photographic images are old, meanwhile, because they bring to mind the most shocking images of American lawlessness from another era: the pictures of lynching parties in the American South standing proudly next to their victims hanging from trees by ropes. The rule of law is missing in both sets of images.

From the perspective of a critic of the United States, the failure of American leaders as well as American soldiers to respect the rule of law might seem especially revealing. Developments at Guantánamo Bay or in Abu Ghraib, a critic might say, reveal the United States’ true character. The country professes a commitment to a rule of law, but if we look deeper, we see the country’s coerciveness. The United States is a bully.

This criticism seems too harsh, but it is true that the belief in the rule of law intertwines with other American beliefs, and this intertwining might invite perceptions of disingenuousness. In particular, the belief in the rule of law intertwines with the American commitment to and promotion of a particular political economy. The latter includes representative democracy, multiparty government, self-fulfillment through wealth acquisition, a market economy, an unequal distribution of wealth, and an emphasis on individual civil and political rights over collective economic and social rights. One could understandably take the American promotion of the rule of law as a false front for achieving one or more of these goals. In the contemporary global context, Americans might be thought to be hiding behind the rule of law in order to achieve world dominance. How sobering it is to think that a belief that has long been central in the American belief system sometimes strikes others as a shield for American hypocrisy. •