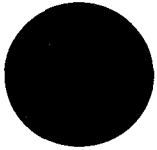


## ADVOCACY

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### Promoting the Rule of Law Abroad

#### How the U.S. Legal and Business Communities Can Help

*Walter Dellinger and Samuel P. Fried*

The U.S. business and legal communities have for some time viewed rule of law promotion as a necessary prerequisite for conducting profitable business enterprises in foreign countries. Firms from every sector, as well as professional organizations such as the American Bar Association (ABA) and the U.S. Chamber of Commerce, have promoted the rule of law internationally to increase the transparency of regulatory environments, eliminate corruption, enforce commercial contracts, and ensure access to dispute resolution mechanisms and courts. Moreover, as the war on terrorism continues and as the United States struggles to build a post-Saddam Iraq, rule of law promotion must be called upon to serve a larger role: to promote democratic reform and enhance stability, thereby advancing America's national security interests.

Now more than ever, both private and public rule of law efforts must be unapologetically and explicitly grounded in a set of universal and essential values. As President Bush said in his 2002 State of the Union, "America will always stand firm for the nonnegotiable demands of human dignity: the rule of law; limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance...because we have a greater objective than eliminating threats and containing resentment." Rule of law promotion has become a national security priority, for only by cultivating liberal democracies in places where there is now

resentment toward the United States and its allies can we secure a lasting victory against terrorism.

Like democratization efforts, rule of law promotion requires patience, close cooperation with partners, and a long-term investment in the people of other countries and cultures. It entails an active redesign of a country's legal architecture as well as sustained engagement to build and strengthen the institutions of civil society that are so important in creating a milieu in which people see—and expect—inclusive, humane laws as part of their lives. However, a sustained, farsighted effort like this rarely commands significant attention from the incumbent president or his top advisors, partly because it offers neither a political nor a military quick fix.

In addition, the government currently lacks the tools to deploy this weapon effectively. Rule of law programs are scattered among many federal agencies, and the budgets for these programs are anemic. Consequently, America's efforts to promote the rule of law have met with mixed success. For example, after the fall of communism, the United States embarked on an effort to develop a constitution, modernize legal codes, and protect property rights in Russia. While those efforts yielded some positive results, few would deny that rampant corruption still plagues the Russian legal system.

For these reasons, the private sector—including the private bar and lawyers work-

ing in-house at American companies—have a responsibility to lend a helping hand.

The business and legal communities should press Congress to provide more funding for rule of law programs. But we should do more than just lobby for more resources. The private sector has had significant hands-on experience with the development of mature legal systems and is therefore in a good position to advise Washington on how best to promote the rule of law abroad.

The private sector should also redouble its own efforts abroad—on the front lines, so to speak—to build legal systems, press for legal reforms, and help infuse societies with a “legal culture” that respects human rights, facilitates free markets, and ensures due process. This would not only harmonize with our business interests, but more importantly, it would support our national interests and values by promoting the creation of peaceful, open societies.

There can be no doubt that promoting the rule of law is a difficult process, as our efforts in Iraq painfully underscore. As reformers, we face three significant challenges: unstable or underdeveloped states, recalcitrant elites, and undemocratic cultures. Overcoming these obstacles will take both a redirection of U.S. policy and the collaboration of the private sector. While there are pitfalls, rule of law promotion efforts, if carried out with care, will speed transitions to democracy, serving both America’s interests and values.

A renewed effort to promote the rule of law requires first and foremost an understanding of what the rule of law is—an issue that has been the subject of extensive debate. Put simply: How do we know when a country has it?

First, it is important to recognize that the rule of law is not value neutral. It is not the same thing as rule by law. The fact that a country has an extensive legal code does not mean that it is necessarily a liberal democracy. Some legal codes lack protections for individual liberties; others fail to

foster due process. The unequal treatment of women in certain countries—no matter how clearly defined in the code of law—is fundamentally incompatible with the values of liberal democracy. Where an independent judiciary is absent, the rights of the individual cannot be protected against the encroachments of state power. There is also the problem of inadequate law enforcement. Thus, rule of law requires procedural rules that facilitate access to justice, an independent judiciary, and a mechanism for educating citizens about their rights within the legal system.

The rule of law is central to the functioning of democracy. In protecting the rights and liberties of the individual, it is a check against the “tyranny of the majority,” against a rampant and rapacious populism. Alexis de Tocqueville recognized the centrality of the rule of law to the fledgling American democracy when he wrote that the courts were the “most powerful existing security against the excesses of democracy.” Indeed, rule of law as a counter-majoritarian force has helped expand and enrich the most visible aspects of American democracy. From the impact of *Brown v. Board of Education* on racial equality to *New York Times v. Sullivan* on the freedom of the press and *Harper v. Virginia Board of Elections* on the right to vote, the American judiciary has been indispensable to our democratic freedoms.

The rule of law is characterized by due process. That is, there are procedures in place to allow individuals to defend themselves against charges by the state, or to prosecute or defend civil suits against others. This requires a judicial system staffed by judges who are impartial and not subject to outside influence. Where the judiciary is independent, contracts are more likely to be enforced, labor law violations rectified, wages paid on time, and basic freedoms respected. Where courts are weak and access to legal redress is limited, people naturally turn to extrajudicial, often violent, means to

settle disputes, and a culture that disdains the legal process is likely to develop.

As Thomas Friedman has noted in his *New York Times* column, the rule of law is part of the “software of democracy” that will determine if countries will be able to operate the “hardware” of free markets.<sup>1</sup> And as the economist Hernando de Soto has argued persuasively in *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, the only way to promote economic growth is to establish an infrastructure that protects legal rights.<sup>2</sup> The rule of law both supports and is supported by a robust civil society. Where there is the rule of law, there usually is tolerance, inclusion, and a respect for human dignity and fundamental human rights. It is no coincidence that failed states—those states that are most likely to collapse into chaos and despair and that are ripe for takeover by parasitic terrorist organizations—lack strong legal systems.

Given the centrality of the rule of law to the functioning of democracies, it is surprising that it has been relegated to the periphery of U.S. democratization efforts. In FY 2002, the State Department, through its Human Rights and Democracy Fund, distributed \$13 million to democracy assistance programs, of which only a small amount went to rule of law programs. The Departments of Defense and Justice spent approximately \$20 million and \$30 million, respectively, on rule of law initiatives. The bulk of rule of law funding—approximately \$150 million in 2002—comes from the United States Agency for International Development (USAID). (While \$150 million is not an insignificant sum, it is less than four-tenths of a percent of the overall national security budget, which is rapidly approaching \$400 billion a year.) Other funding comes from the World Bank, from the National Endowment for Democracy (NED), and, to a lesser degree, from the private sector, which has focused mainly on those areas that most directly affect profitability,

such as fighting corruption and encouraging transparency.

The relative lack of funds for rule of law programs reflects the focus of democratization efforts on elections as the sine qua non of democracy. Under the “transition” paradigm of democratization, any country that is seen as moving away from dictatorial rule and adopting democratic norms is considered to be democratizing. Central to this transformation is the breakthrough election in which the opposition comes to power. By this standard, those living in Haiti or Belarus would be living in democratic states. As Fareed Zakaria observes in his new book, *The Future of Freedom: Illiberal Democracy at Home and Abroad*, free elections do not necessarily lead to free societies.<sup>3</sup>

Thomas Carothers of the Carnegie Endowment for International Peace has pointed out the flaws in this way of looking at democratization. In “The End of the Transition Paradigm,” he notes that most countries that hold elections fall into one of two categories.<sup>4</sup> Some are denoted by a “feckless pluralism” in which there are “significant amounts of political freedom, regular elections, and the alternation of power between seemingly different political groupings.” Yet the people are politically disaffected and the country is run by political elites of both parties that are seen as corrupt and self-interested. Carothers puts countries such as Guatemala, Honduras, Nepal, and Bolivia into this category. Others are characterized by “dominant-power politics,” in which the basic institutions of democracy exist, yet political life is dominated by a single grouping. There is little distinction between the group and the state. The judiciary is typically compliant and obedient, and political opposition is tolerated only as long it does not pose a threat to the leadership. Nations such as Egypt, Morocco, Yemen, Malaysia, and Armenia fall into this category.

Thus, while elections confer legitimacy upon a regime, democracy does not neces-

sarily follow. Yet, we can empathize with those who emphasize electoral outcomes, for convincing those in power to agree to elections and counting ballots is considerably easier than instituting the rule of law.

### *Three Challenges to the Rule of Law*

There are three primary challenges to instituting the rule of law in countries in transition. First, as Carothers notes, one needs a coherent, functioning state upon which to build a democracy. Democratization theory assumes the existence of such institutions—however flawed—as a legislature, a judiciary, and regulators. This may have been the case in Southern Europe and Latin America, but as we have seen in Afghanistan and Iraq, there is often a fair amount of basic state building that must be undertaken alongside any democratization efforts.

The second challenge is that presented by elites. The importance of elites—academic, cultural, media, political, and legal—in leading countries toward democracy, equality, openness, and tolerance was made abundantly clear in such places as the Czech Republic, Poland, and South Africa. Elite leadership is essential to the formation of a consensus in favor of liberal democratic governance and to reforming the educational system, the media, the courts, and the wider culture into a society in which the values that underpin the rule of law are respected. Bureaucrats and regulators from predecessor regimes may have to be weaned from such corrupt practices as bribe taking.

Elites are also critical to the practical application of the rule of law. Those who adjudicate disputes, argue cases, and enforce the law must have not just the inclination but also the ability to do so in a fair manner. Judicial reform may be hampered by judges who resist change. As Carothers noted in his book, *Aiding Democracy Abroad*, judiciaries in democratizing countries are usually decentralized institutions filled with independent-minded individuals inclined to

resist political pressure.<sup>5</sup> Thus, the focus of rule of law promotion ought to be shifted from the ministries of justice and those at the top to those working in the legal trenches, to the judges, the lawyers, and their staffs. Compounding the problem is the fact that there is usually little popular support for judicial reform. Thus, while there may be a crusading younger generation of lawyers pushing for reform—such as in Peru—there usually is not a mass movement for them to tap into in order to bring about systemic changes.

The final challenge is perhaps the most stubborn: the challenge of culture. Reflecting on his work in assisting Russia and South Africa draft their new constitutions, University of Chicago Law School professor Cass Sunstein stresses the importance of “cultural support for constitutional institutions.”<sup>6</sup> But convincing citizens of democratizing states to value individual rights, hold state and elected officials accountable for upholding the law, and look upon the judicial system as the preferred avenue for adjudicating disputes is a tall order. Yet this transformation is critical because, ultimately, the rule of law is enforced by the expectations of the people under its dominion. It is what compels the executive to obey the decisions of the judiciary, and it is what leads citizens to the courts for legal clarifications and interpretations that ultimately strengthen democracy and lead to tolerance and respect for human rights.

### *What We Can Do*

A reinvigorated rule of law initiative that directly addresses these challenges will require a multifaceted, sustained, and coordinated effort on the part of the U.S. government, along with a serious commitment on the part of the American legal and business communities.

The U.S. legal community is uniquely qualified to help promote the rule of law for the simple reasons that we have been doing it for decades here at home and we possess

the know-how and the resources to launch and sustain this effort abroad.

First, we should lead the advocacy effort in Washington to make robust rule of law promotion an important part of American foreign policy. As the United States wages its war against terrorism, it must also recognize the importance of winning the peace. That does not just mean promoting national elections. Focusing inordinately on electoral processes distracts policymakers and the public from the harder and lengthier work of instituting the rule of law, key to the operation of a market economy and liberal democracy. Moreover, new regimes that are certified as having come to power in free and fair elections often fail to institute other democratic reforms; in a sense, they have been given the keys to the democratic club without having had to pay the price of admission. We ought to encourage the Bush administration to overcome its reluctance to engage in nation building, to acknowledge that liberal democracy can only take root in the soil of functioning states that possess a civic culture where human rights are respected. Ignoring failed states only creates havens for terrorists and international criminals.

Second, we should urge the administration to utilize one of the most effective tools of our national power—trade—to reward countries that are moving on the path toward democratization and open markets. Laws such as the Africa Growth and Opportunity Act, which promotes trade between the United States and Africa, ought to serve as a model for other legislation to lift trade barriers that disproportionately affect developing countries.

Finally, we should lobby Congress and the administration to take a more active role in supporting democratic reforms and dissidents in countries in transition by directly funding those efforts. Currently, USAID assistance—the largest source of democratization aid—is actually allocated by the often undemocratic governments of the recipient coun-

tries. While this may be necessary, and at times even effective, civil society reformers, including pro-democracy forces, should be given assistance directly by the U.S. government, through adequately funded NED programs and private foundations.

As we have noted, programs to promote the rule of law are scattered among various government agencies. They should be centralized under a single coordinating authority. This authority should also oversee a detailed monitoring of the state of legal systems abroad, issuing an annual report detailing which nations are progressing and which are not. U.S. embassies also need to be staffed with rule of law liaisons who can act as monitors and advisers to democracies in transition.

But the U.S. government cannot take on the task of promoting the rule of law alone. The business and legal communities must also be prepared to become more involved in these efforts.

As John Hewko—a visiting scholar at the Carnegie Endowment for International Peace and a lawyer with extensive experience in Eastern Europe—noted in a recent working paper, sweeping reform efforts to expand due process or modernize the judiciary are less likely to be successful in the short term than specific, concrete changes to existing law that can help the business climate.<sup>7</sup> Ideally situated to analyze what particular changes are needed in a given country are the businesspeople operating there. They should establish legal databases and share their knowledge of legal developments—in seminars, articles, and informal meetings—with U.S. embassy staffs, in order to help our government understand where American rule of law expertise might be most helpful and which individuals in democratizing countries (in the private sector and in government) are likely agents of reform.

Second, the legal community should also help create an initiative whose sole focus would be to promote the rule of law on a

global scale. The American Bar Association, through its Central and East European Legal Initiative and other regional initiatives, has assumed a key role in rule of law promotion. We should support broadening the scope of these efforts so that no region of the world is neglected.

The ABA is understandably reluctant to partner extensively with the corporate sector, however, lest it be seen as a front for American businesses. For that reason, business and legal leaders should consider establishing their own global rule of law initiative, designed to provide resources and expertise to lawyers, judges, and other advocates of legal reform in foreign countries. The NED-funded Center for International Private Enterprise does deal with some rule of law issues, but its focus is mainly on commercial matters. The private sector's approach should not be limited to the commercial, but should encompass all aspects of the legal system. Such an initiative should support and train legal reformers in the practicalities of running a legal system and the core values that undergird them.

Third, the private sector must take a leadership role in promoting the rule of law with foreign governments. The business and legal communities together are a powerful force for reform, with significant influence in countries seeking investment. Business leaders need to use their position to prod governments to make specific reforms: not simply changes directly related to commerce—such as creating transparent regulatory regimes—but also changes that deal with rule of law more broadly—such as access to the courts and due process. To this end, U.S. business schools and professional associations need to emphasize the importance of the rule of law and instruct present and future business leaders in how they can work with foreign governments to implement it.

Fourth, the private sector should devote greater resources here in the United States

to training the next generation of foreign legal reformers. Internship and exchange programs—such as the Billington Open World Russian Leadership Program and SABIT (Special American Business Internship Training)—that bring young leaders from abroad to observe and experience American political and corporate life while living in American communities should be expanded to help shape a new generation of political, business, and legal leaders committed to the rule of law. The ABA, the American Institute of Certified Public Accountants, and other professional organizations should take a lead role in these efforts to bring young professionals to the United States and in making the promotion of the rule of law a high priority through their pro bono and other professional activities.

In addition, the bar should help U.S. law schools design and implement a curriculum for a new course of study on rule of law promotion that would train both American and foreign law students in how to work for values-based legal reform. New York University now offers a degree in global public interest law, and GlobalWorks Foundation—a new nonprofit working in this area—has created the Washington Education Program to train lawyers, primarily from developing countries, in rule of law and globalization issues. Specifically, the GlobalWorks program brings foreign public interest lawyers—normally at an early stage in their careers—together with officials and opinion leaders from the U.S. government, international financial institutions, major nongovernmental and research organizations, and corporations, in order to foster mutual understanding, generate new ideas and approaches, and enhance the effectiveness of these legal reformers when they return home. We must build on such initiatives. Only by training a new generation in the rule of law can one hope to transform a nation's governmental structures and hasten the march toward democratization. ●

## Notes

1. Thomas L. Friedman, "Needed: Iraqi Software," *New York Times*, May 7, 2003.

2. Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

3. Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: W. W. Norton, 2003).

4. Thomas Carothers, "The End of the Transition Paradigm," *Journal of Democracy*, vol. 13 (January 2002).

5. Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington, D.C.: Carnegie Endowment for International Peace, 1999).

6. Cass R. Sunstein, "American Advice and Constitutions," *Chicago Journal of International Law*, vol. 3 (spring 2002), p. 178.

7. John Hewko, "Foreign Direct Investment: Does Rule of Law Matter?" working paper no. 26, Carnegie Endowment for International Peace, Washington, D.C., April 2002.