

Testimony of

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TOWARD CONSTITUTIONAL DEMOCRACY IN IRAQ

AN AMERICAN PERSPECTIVE

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In recent years I have had the privilege of sitting at the elbows of constitution-makers in countries seeking to lay the foundations of constitutional liberal democracies in those countries. Some years earlier, I cut my teeth in the art of constitution-making when I was involved in the drafting of Virginia's present state constitution. I have also consulted with other states seeking to revise their constitutions. But no experience has been so instructive as watching constitutions take shape in the context of other lands and cultures.

This experience in comparative constitutionalism has drawn me to ask questions about the extent to which one country can assist in, or make judgments about, another country's constitutional journey. How well do constitutional ideas travel, especially across the boundaries of different cultures or legal systems? Are there universal values by which the relative success of a constitutional system may be measured? Or, as some people argue, must constitutions ultimately be grounded in a country's culture, history, traditions, and circumstances? For Americans, there is the specific question: what relevance does the American constitutional experience have for other countries?

THE EXPERIENCE OF CENTRAL AND EASTERN EUROPE

To sharpen these questions, consider the experience of the countries of Central and Eastern Europe. After the collapse of communism, each of those countries set out to write new constitutions and to design institutions thought

to promote constitutional liberal democracy. Drafters in those countries (Poland, Hungary, etc.) had several sources on which they could draw in devising new constitutions.

(1) In some cases they could look back to their own indigenous sources and experience. For example, Poles recall the traditions of constitutionalism associated with the memorable Constitution of May 3, 1791. Hungarians have a strong tradition of the rule of law, having its roots as early as the Golden Bull of 1222. But such traditions are often fragmentary and remote, Few countries in Central and Eastern had any extended experience with either constitutionalism, democracy, or the rule of law before 1989 (Czechoslovakia's vibrant democracy between the world wars was a notable exception).

(2) Countries in Central and Eastern Europe have been able to look -- and have looked -- to the experience of Western Europe. Western Europe is, of course, the seat of much of the core of modern constitutional democracy (such as the teachings of the Enlightenment), but also the sources of many of our basic constitutional principles (such as the separation of powers). Moreover, constitutionalism, democracy, and the rule of law have taken hold in manifest ways in Western Europe since World War II. Germany, rising from the ashes of World War, II has become a admirable example of constitutional democracy. Spain, moving beyond the legacy of Franco, has become in every respect a modern Europe state. With these and other examples to study, drafters in Central and Eastern Europe have fashioned constitutional systems which in many obvious ways are modeled upon Western Europe. For example, Germany's Constitutional Court has proved the inspiration for the creation of constitutional courts throughout Central and Eastern Europe.

(3) International norms and documents are an important source for constitution-makers in post-communist Europe, just as they are in other parts of the world. Especially is this true in giving shape and protection to human rights. Thus drafters look to such international documents as United Nations conventions and to regional arrangements such as the European Convention on Human Rights and OSCE's Helsinki and Copenhagen documents. Also, it is common for post-communist constitutions to state that international law and agreements shall be domestic law within a country.

(4) One would suppose that constitution-makers in Central and Eastern Europe would study the experience of their neighbors in the region. Especially might this seem helpful when these countries have shared many of the problems of the post-communist world, such as the destruction of civil society during the communist era, the stultifying effects of command economies, and the cynicism about public life which was spawned by those years. It is my impression, however, that drafters in the region have not cared much to study their nearest neighbors' experience. This may partly be a consequence of historic enmities in the region. But it may also underscore the powerful pull of western models, especially in light of the pervasive wish of countries in Central and Eastern Europe to "rejoin" the family of Europe, in particular, to become members of the European Union.

(5) Has the post-communist world looked to the American experience and to American ideas and models? A superficial look at new constitutions in the region might suggest that American influence has been slight. Throughout Central and Eastern Europe, one sees, for example, parliamentary systems rather than an American-style congressional system, presidential systems which look more to Western Europe (such as France) rather than to the United States, and constitutional courts resembling that of Germany rather than an American-style Supreme Court. The question of American influence -- whether in post-communist Europe or in other countries (such as Iraq) -- requires, however, a deeper enquiry than this superficial survey might suggest.

THE INFLUENCE OF AMERICAN CONSTITUTIONALISM: AN HISTORICAL PERSPECTIVE

The American revolutionary period was a time of remarkable innovation and accomplishment. Aware of their special place in history, the founders shaped such ideas as federalism, separation of powers, judicial review, and other concepts which have proved to be among the core principles of modern constitutionalism. not only in the United States, but in many other countries as well. American society differed in important ways from that of Europe; there was, for example, no monarchy and no legally entrenched social order. Even so, Europeans followed with fascination the evolution of American constitutionalism from the revolution, through the making of the Constitution, and beyond.

For two centuries and more, there has been intense traffic in constitutional ideas between America and other lands. Highlights of those exchanges include the following.

The founding era in France and America. The French Revolution, in 1789, brought close French attention to American ideas. Benjamin Franklin, immensely popular in Paris, undertook to spread news of what was happening in America, as did his successor, Thomas Jefferson. The Virginia Declaration of Rights (1776) influenced the drafting of France's Declaration of Rights of Man and the Citizen (1789). When the French National Assembly debated France's first constitution, moderate and radical factions invoked examples drawn from the experience with American state constitutions, especially Massachusetts and Pennsylvania. Ultimately, French constitutional development took a markedly different course from that of America, but it is instructive that in many ways it was America's founding documents that helped frame the debates in France.

Liberalism in the nineteenth century. In the early decades of the nineteenth century, liberal reformers in Europe and in South America invoked the United States as proof that liberal democracy could survive and flourish. When the revolutions of 1848 broke out in Europe, conventions meeting in France and Germany frequently dissected American institutions in deciding what a liberal constitution might look like in Europe. By this time, Toqueville's *Democracy in America* had heightened interest in the American experience, especially federalism and judicial review. Germany's Paulskirche Constitution, drafted in Frankfurt, was not in fact implemented, but its principles, building in part on American ideas (e.g., federalism and constitutional review), have reappeared in Germany's Basic Law of 1949. In South America, the age of Bolivar brought constitutions which were often modeled heavily on the United States Constitution. South American soil was, however, not yet fertile for such transplants, and these experiments were largely failures.

Political evangelism in the early twentieth century. When the United States acquired the Philippines as a result of the Spanish-American War, President McKinley described American policy as "benevolent assimilation." These plans included gradual development of self-government, the creation of a system of public education, and the transfer of American legal ideas. The Constitution adopted in 1935 owed much to American influence but drew upon other traditions as well. In 1946 the Philippines became independent.

The most famous effort to export American ideas in the early twentieth century was, of course, President Woodrow Wilson's aim, with the allied victory in World War I, to "make the world safe for democracy." Wilson did not think that other countries had to adopt an American-style constitution. But he did emphasize self-determination, free elections, the rule of law, individual rights, and an independent judiciary. The most successful democracy to rise from the ashes of World War I was Czechoslovakia, whose leading founder, Thomas Masaryk, had spent part of the war in the United States, working hard to influence American policy.

Japan and Germany after World War II. After the Japanese surrender in 1945, General Douglas MacArthur moved promptly to secure the drafting of a new constitution. Concerned that the Japanese elite, left to their own devices, would make little substantial change from the status quo, MacArthur instructed his military government to draft a constitution, which they did in a matter of days. Debate still continues, especially among Japanese politicians and scholars, over the extent to which the Constitution of Japan was imposed or has become in fact Japanese.

By the time drafting got underway on what became Germany's Basic Law of 1949, the Cold War was beginning to dominate American foreign policy. The occupying allied powers had a say, of course, in shaping German post-war policy. But, with the Americans and their allies seeing the Soviet Union as the greater threat, the Germans had a freer hand in the Basic Law's drafting. There are important ways in which the Basic Law has principles familiar to Americans, such as federalism and judicial review. But the 1949 document owes much to Germany's own constitutional tradition, including the Paulskirche Constitution of 1949.

Waves of democratization in the latter decades of the twentieth century. The spread of constitutionalism, democracy, and the rule of law came in waves in the closing decades of the twentieth century. The 1970s saw autocratic governments yield to democracy in Mediterranean countries -- Greece, Portugal, and Spain. Spain's 1978 Constitution is especially important as a model for other post-authoritarian countries. Attention shifted to South America in the 1980s, notably to Argentina and Chile. The great year was 1989 -- the year the Berlin Wall came down

and communism collapsed all over Central and Eastern Europe. The shock waves also hit South Africa, where the apartheid regime fell, and a new constitution came into effect in 1997.

American assistance to constitution-making and democratization in such places as post-communist countries has been undertaken both by public and private bodies. Typically the aid has taken the form of technical assistance, such as helping parliaments to update their processes, nurturing an independent judiciary, and assisting in the drafting of new constitutions and laws. An especially effective program is the American Bar Association's Central and Eastern European Law Initiative (now the Central European and Eurasian Law Initiative), which has sent hundreds of experts to work in scores of countries. Often the efforts of American advisors has been paralleled by advice and assistance from European governments and bodies, such as the Council of Europe's Venice Commission.

THE PLACE AND RELEVANCE OF THE AMERICAN CONSTITUTIONAL EXPERIENCE

When other countries write constitutions and set out to shape a constitutional regime, of what relevance is the American constitutional experience? What follows are arguments which lead some to conclude that the American experience is of limited value in other countries and cultures.

(1) Constitutionalism must be understood as an expression of culture. Few would argue with this proposal if it is advanced as a caveat, namely, that one should always take culture into account in thinking about constitutions and constitutionalism. But some observers take the argument further, contending that there are no "universal" elements of constitutionalism. For example, by this view, community or group rights could be valued above individual rights.

(2) American constitutionalism was the result of Enlightenment assumptions, steeped in British constitutionalism, and shaped in the historical settings of America. Some argue, therefore, that the teachings of American constitutionalism cannot be exported to other cultures. Such arguments often cite the failure of Latin American constitutions based on the US model and more recent problems in places such as the Philippines.

(3) Even those who think the American experience is relevant and useful find limits in the United States Constitution as a model for foreign drafters. The document was written in the eighteenth century, reflects the insights of that era, and has required formal amendment (notably the post-Civil War amendments) and extensive judicial interpretation and gloss. Much of the American jurisprudence of rights results from judicial gloss rather than from the explicit constitutional text (for example, the process of "incorporation" doctrine by which guarantees of the Bill of Rights are applied to the states). Also, the United States Constitution is, in a sense, an incomplete document, in the sense that its framers assumed the existence and function of the states and therefore of state constitutions (documents which in many ways are rather more like constitutions in other countries).

All of these observations have force and ought to be taken into account, especially before assuming that what has worked well in America must surely work for other peoples as well. But the problems of comparative constitutionalism ought not to be turned into categorical barriers. The usefulness of the American experience does not lie in the formal text of the United States Constitution. It is to be found in the general principles which are reflected in American constitutionalism and, further, in the practical experience of making constitutional democracy work.

Many of the most basic ideas in American constitutionalism reflect norms that furnish at least presumptive value elsewhere. Examples include the following

(a) Federalism. Formal federalism, as charted by the Constitution, may or may not be appropriate in other countries. Federalism, however, is a system which has many variants and is found in one form or another around the world. Federalism and its cousins (such as devolution) is associated with values of pluralism, diversity, and local choices about local problems. Such arrangements may be especially important to defuse conflicts of nationality or ethnicity.

(b) Separation of powers. This principle, celebrated by Montesquieu and refined by Madison, is a way of achieving limited government -- one of the ultimate guarantees of individual rights. In its historical uses, it has been used to counter the tendency of such doctrines as popular sovereignty and legislative supremacy to become arbitrary or tyrannical.

(c) Judicial review. Various devices have been used in an effort to keep a constitution's promises. These include popular will, separation of powers, and legislation. In the modern world, however, constitutions increasingly look to judicial review as a key means to enforce constitutional norms. John Marshall's insights in *Marbury v. Madison* have become a familiar part of constitutionalism around the world. One may well suggest that no American contribution to constitutionalism has been more pervasive or important than this one.

These ideas and principles are complemented by the practical experience of making American democracy work. Many countries have entered the age of constitutional democracy with little or no experience with such concepts as constitutionalism, democracy, and the rule of law. For example, for a half century the countries within the sphere of Soviet domination lived in a domain cut off from any such concepts. Thus American or other advisors can bring the fruits of hands-on experience in organizing political parties, conducting free and fair elections, nurturing a free and responsible press, creating an independent judiciary, and instilling the values of citizenship through civic education.

FACTORS BEARING ON THE PROSPECTS FOR CONSTITUTIONAL LIBERAL DEMOCRACY

It is not enough that a society be democratic. It must also be liberal and constitutional. Democracy seeks to assure that government is based upon the consent of the governed and is accountable to the people. But democracies should also be liberal, that is, committed to individual rights and freedoms, to the Lockean principle that the state depends on the individual, not the other way around. And democracies must also be constitutional, that is, there must be means to assure the enforcement of constitutional norms, even when that means negating a majoritarian judgment.

What are some of the factors bearing upon the prospects for the success of constitutional liberal democracy? Each person might draw up his or her own list, and one might debate the relative place and weight of each factor. But a list of factors would likely include at least the following. Note that the list goes well beyond those factors which can be incorporated into the text of a constitution.

(1) A country should have sufficient military strength, as well as social and economic stability, to counter foreign aggression and to guard against internal subversion or unrest. Strength need not come, of course, solely from the country's own resources. A country may properly look to its allies, as, during the Cold War, so many democracies (not just weak ones) counted on American support in the event of Soviet aggression.

(2) A vibrant constitutional culture often goes hand in hand with a healthy economy. I do not contend that, because countries are rich, they will necessarily be constitutional democracies. There are countries rich in oil, for example, which one would be slow to characterize as constitutional, liberal, or democratic. But it does seem fair to say that poor economic conditions often work to undermine any hope for constitutional democracy.

(3) There should be a political culture -- I would call it a constitutional culture -- which encourages the values of constitutionalism, liberalism, democracy, and the rule of law. This implies a high level of literacy. But it also implies circumstances in which citizens have practiced the norms of cooperation, toleration, and forbearance associated with the fluctuating fortunes of causes, candidates, and parties. It means that those who lose an election turn the reigns of power over to the winners. It means that those who find that a victory in the legislative process is overturned on constitutional grounds by a court accept the principle of constitutional limits on government.

(4) An open society, including free and responsible press and media, is the handmaiden of constitutionalism and democracy. There should be the means for open and effective communication both among the people and between them and their government.

(5) Civil society should flourish. Private organizations -- political parties, trade unions, interest groups, clubs, etc. - create an important buffer between the individual and the state. Such organizations offer a place of refuge for those who think that the politics of the moment are not in their favor. They offer training grounds for the qualities which make for effective citizenship and make possible the kind of collective voice and action which precludes the state's monopoly of power.

(6) States should be based on the civic, rather than ethnic or national, principle. That is, all citizens should have equal standing in the society. There should not be "insiders" and "outsiders." If the state is not largely homogeneous in terms of religion, language, ethnicity, or culture, then there needs to be a widely felt commitment to toleration. To make constitutional liberal democracy work, the people must have a level of mutual trust, and ability to cooperate, rather than fragmenting into camps of hate and hostility.

Ultimately, history, culture, and circumstance will tell us much about the prospects for constitutionalism, democracy, and the rule of law in any country. Those who hope to see these values prosper in Iraq must understand Iraq itself -- its people, its history, its culture. Some factors characterize the region, for example, the argument over the extent to which Islam is, or is not, ultimately compatible with constitutional liberal democracy. Other factors flow from Iraq's own history, for example, the question whether the parliamentary experience of the Hashemite years before 1958 has any useful legacy, or whether the middle class has been sturdy enough to survive the years of Saddam's repressions. Experts on Iraq will help inform these judgments. But those who would shape events in Iraq should also consult the lessons to be learned from transitions from totalitarian or authoritarian regimes elsewhere. The road to constitutionalism, democracy, and the rule of law takes one through many lands.