9-10-2017

Norms, Law and the Impeachment Power

John M. Greabe

University of New Hampshire School of Law, john.greabe@law.unh.edu

Follow this and additional works at: https://scholars.unh.edu/law_facpub

Part of the American Politics Commons, Constitutional Law Commons, and the President/Executive Department Commons

Recommended Citation


This Editorial is brought to you for free and open access by the University of New Hampshire – School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of University of New Hampshire Scholars' Repository. For more information, please contact ellen.phillips@law.unh.edu.
Norms, Law and the Impeachment Power

Additional Information
This article is part of the series Constitutional Connections by John M. Greabe and was originally published by the Concord Monitor.

This editorial is available at University of New Hampshire Scholars' Repository: https://scholars.unh.edu/law_facpub/297
Norms, law and the impeachment power

The Path of the Law, written in 1897 by then-Massachusetts Supreme Judicial Court Justice Oliver Wendell Holmes Jr., is one of the most important essays in American legal history. Originally delivered as an address to law students at the dedication of a new building at Boston University Law School, and later published in the Harvard Law Review, The Path of the Law cautioned students who wished to understand the true nature of law against confusing it with moral norms.

Moral norms might lead a person to conclude, for example, that one should honor one's agreements. But the law of contracts does not. If it is in a person's economic interest to violate contract A in order to enter into a more lucrative contract B, the law usually poses no barrier.

Keeping law and moral norms conceptually separate can be a tricky business because the law is peppered with lots of moral jargon, and is frequently misunderstood as a body of principles that mark the line between right and wrong.

To differentiate law from mere norms, Holmes famously argued, one must look at it from the perspective of a “bad man, who cares only for the material consequences which ... knowledge of the law enables him to predict.”

So understood, law consists of

A Little Perspective

VIPPIN NARANG, WRITING IN THE WASHINGTON POST: “Yes, Kim Jong Un (pictured) is a brutal and a monstrous. But history teaches us that history often has a different perspective. Kim's nuclear arsenal exists to stop his enemies' quest for regime change. If North Korea and the United States wind up shooting at each other, it might make sense for Kim to use nuclear weapons first in a way that increases his chances of survival. This basic idea is to use one set of nuclear devices first to stave off the conventional invasion, and hold in reserve longer-range, more powerful devices that threaten the enemy’s cities to deter nuclear annihilation. It’s a doctrine called ‘asymmetric escalation,’ employed by states that are conventionally weak. France used it during the Cold War to deter the more powerful Soviet Union, and Pakistan does the same today against a more powerful India. The strategy turns on Kim’s main calculation that the United States will say it’s not worth losing a major American city to get rid of him. This would allow him to avoid the fate of Iraq’s Saddam Hussein, and Libya’s Muammar Gadhafi, who did not have nuclear weapons. Deterrence worked uneasily during the Cold War - albeit with close calls and some hair-raising moments - but it worked. Many of the same principles about mutual destruction still obtain today between major powers.”

NHsnapshot

Jimmy Carter meets Lloyd Roble during Carter's 1976 campaign for president in Hooksett. Roble's country store was a fixture on the campaign trail for presidential primary hopefuls. When Carter stopped in for coffee and a doughnut, Roble was one of the first to hear the line, “Hi, I'm Jimmy Carter and I'm running for president.”
The scope of the Democratic defeat requires a new humility

**DEMOCRATS FROM D1**

history of feeding at the same corporate trough as the Republicans.

It has been very hard to know what Democrats stand for. The Hillary Clinton campaign was the absolute embodiment of this approach. The belief was that it was enough to be anti-Trump because he was so uniquely disgusting.

The Hillary campaign slogan was "Stronger Together." That has to be the apotheosis of meaningless.

Let me offer a suggestion: The Democrats must be the party of progressive change - not a status quo party. We already have one conservative party, the Republicans. Democrats need to provide a stark contrast to the Republicans.

Clintonian triangulation is not a progressive vision of the future.

One of the most maddening aspects of the last election was Trump's ability to seize the mantle of being a change agent. The Democrats mistakenly ceded that territory because they were caught up in defending the status quo under President Obama. In touting the status quo, the Democrats utterly misread the public and its anxieties.

Even though Trump is a fraud and a pathological liar, he had the political horse sense to know people were hurting badly. Siding with "forgotten" Americans was smart politics. The Clinton campaign lost touch with the public mood at the same time as it played it safe.

While he did not win, Bernie Sanders had a much more accurate read on the public. His populist message attacking Big Money did strike a nerve. He showed the possibility of running without reliance on millionaires and billionaires. His millennial support grew, in part, because of his awareness of crushing student loan debt and the need to address that.

Democrats need to learn from what was positive about the Sanders campaign. The America Sanders described was much closer to the mark than Clinton's take. The Democrats’ continuing cluelessness about the reasons for Sanders's popularity is sad. Maybe they should not be so ready to dismiss the candidate who has the highest approval rating of any politician in the country.

I know this will be unpopular to say but, along with Hillary Clinton, I blame President Obama for the Democratic defeat. Obama bailed out banks more than working people. His Justice department never prosecuted the white-collar criminals who crashed the economy. Nor did he do much to help the 5 million people who lost their homes to foreclosure.

During the 2016 election campaign, President Obama and Secretary Clinton emphasized all the economic progress made. They praised the recovery made from the recession, saying 15 million jobs had been created.

The problem is this narrative did not ring true to millions of working people across America because it wasn't. Much of Middle America remains a post-industrial wasteland. Many worry their jobs will be automated or shipped to the Third World. The jobs created are typically a far cry from the jobs lost. A college degree now guarantees nothing, and people are legitimately anxious about the future. They have been screwed by the system and the future hardly looks rosy.

Too many jobs do not pay enough. And they lack good benefits. Twenty-somethings cannot make enough to move out of their parents' homes and fifty-somethings are cut out to pasture early. Health insurance is too expensive (if people have it) and now looks even more tenuous. Student loans are a killer, like carrying a second mortgage payment. Contrary to Clinton and Obama's assertions, it is not a pretty picture.

The Democrats need to look at where in America they have to focus early. This includes small cities, towns and rural America. The Democrats need a respectful and compelling message that can appeal nationally. Too often, to the rest of America, the Democrats look like an economically ascendant coastal elite, disconnected from working-class people.

Message to the Democrats: Not everybody went to Harvard and Yale. If they want to win, the Democrats need to totally overturn their present leadership. It needs to be said: the leadership has failed. It does not derogate past leaders like the Clintons or Pelosi to acknowledge that they are past. It is time for a new generation of Democratic leaders who can make a fresh start. Whatever the merits of past leaders, they all have too much baggage, and they are heavily implicated in the wave of Democratic defeats leading to the Trump debacle.

The Democrats need to stop pretending they can simply repackaging their failed, timid policies. Those policies never seriously challenged income inequality.

The scope of Democratic defeat requires a new humility. Considering all the defeats, there may be something more ridiculous and obnoxious than self-righteous posturing by progressives. I hope the party advances in a far more progressive direction, but the party must have no litmus tests and it should be welcoming to a wide range of divergent views.

I believe the Democrats can turn it around. But, without self-critical evaluation of their mistakes, they could very well repeat them.

(Jonah K. Baird of Wilmarb works at The Social Security Administration. His column reflects his own views and not those of his employer.)

---

**CONSTITUTION FROM D1**

“nothing more pretentious” than “the prophecies of what the courts will do in fact.” Law is, in other words, nothing more or less than that which actually will lead to adverse consequences if you violate it.

During his campaign and since assuming office, President Donald J. Trump has on numerous occasions acted in ways that many Americans regard as inconsistent with norms we expect the president to observe.

He has, among other things, suggested that a federal judge of Mexican ancestry was biased against him because of that ancestry, attacked the integrity of judges who ruled against his administration in lawsuits challenging his “travel ban,” profited off of the presidency and appointed inexperienced family members to key government posts.

He also has criticized foreign allies, cozied up to foreign adversaries, levied baseless accusations against former President Barack Obama, fired an FBI director who was investigating whether persons affiliated with his presidential campaign colluded with Russia to interfere in last year's election, and pardoned a former county sheriff who was prosecuted by his own Justice Department and convicted of showing a criminal contempt for the orders of a federal court.

But do any of these norms-violations raise the possibility of adverse consequences that could transform them into violations of law and the Constitution?

In considering this question, notice that the president is both privileged and specially encumbered in comparison to Holmes's hypothetical “bad man.” In other words, the law applicable to the president differs from the law applicable to ordinary civilians.

Insofar as the adverse consequence essential for a principle to be a law (under Holmes's definition) it is an adverse court judgment, the president is privileged vis-à-vis civilians.

Most experts believe that, while a president can be criminally prosecuted after leaving office, he cannot be prosecuted while he is president. And while the president may be sued civilly while holding office, the office confers powerful immunities and other constitutional defenses that are unavailable to ordinary civilian defendants.

But insofar as the question is whether mere norm-violations can ground official adverse consequences, the president is specially encumbered vis-à-vis civilians.

The Constitution gives Congress the power to impeach and remove the president for "Treason, Bribery, or other high Crimes and Misdemeanors." Obviously, conduct constituting a violation of a statute can fall within this constitutional definition.

But experts agree that Congress also may exercise the impeachment-and-removal power for conduct that falls short of being a direct statutory violation - for example, conduct that "merely" violates the president’s oath to "faithfully execute the Office of the President of the United States," or to "preserve, protect and defend the Constitution of the United States.

So where do things stand with President Trump? Has he violated “law” in a manner that warrants the adverse consequence of impeachment and removal from office?

A special counsel is investigating whether members of the Trump campaign colluded with Russians to meddle in the 2016 election, and whether the firing of FBI director James Comey - who was investigating the same question - constitutes an obstruction of justice. And at least one state prosecutor is also said to be investigating persons close to the president for criminal conduct.

If these investigations yield evidence that convinces Congress that the president has committed one or more serious crimes, the president clearly can be impeached and removed from office on that basis.

But even if no direct violation of a statute is shown, Congress still may impeach the president and remove him from office for repeated, serious disregard of presidential norms.

Thus, there is “law” governing the president's conduct that is different from the law governing the rest of us.

In a very real sense, the judgment of Congress regarding the norms of the presidency also can constitute “law” that the president must observe - at least insofar as Congress is prepared to act against a president who violates those norms.

(John Grebe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civic Education.)