The Independent Judiciary and Economic Development

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The worlds of commerce, of enterprise, of the "business" community, have a large stake in the rule of law. Lip service is given to this principle and it is more honored in the offshore pronouncements and works of U.S. representatives than preached and strived for in the U.S.

Several years ago state and local Bar Associations and the Committee for Economic Development sought support from the "business community" for the independent judiciary and its view that the independent judiciary is essential to the "rule of law" and economic development. The several tasks of the "business community" have been to ensure the function of the independent judiciary through attention to judicial selection and judicial compensation and benefits. From a business perspective the focus has been on the controlling influence of judicial infrastructure and the rule of law to ensure economic development and progress here and around the world.

Ironically, the best recent statements on these concerns have been presented in support of international standards for the rule of law in economic development. The essence of the appeal of the rule of law in offshore economic development is captured in the following observations under World Bank auspices from one of your colleagues, Richard Posner:

"Markets are more robust than some market-failure specialists believe. But their vigor may depend on the establishment of an environment in which legal rights, especially property and contractual rights, are enforced and protected – an environment that is taken for granted in wealthy nations …

The citizens of wealthy countries take this legal machinery for granted because it works well enough most of the time and because it does not cost a great deal. In its ideal form (an important qualification), the machinery

consists of competent, ethical, and well-paid professional judges who administer rules that are well designed for the promotion of commercial activity. The judges are insulated from interference by the legislative and executive branches of government. They are advised by competent, ethical, and well-paid lawyers. Their decrees are dependably enforced by sheriffs, bailiffs, police, or other functionaries (again, competent, ethical, and well paid). The judges are numerous enough to decide cases without interminable delay, and they operate against a background of rules and practices, such as accounting standards, bureaus of vital statistics, and public registries of land titles and security interests, that enable them to resolve factual issues relating to legal disputes with reasonable accuracy and at reasonable cost to the disputants."[1]

The world wide impact of these principles is now well recognized: the independent judiciary is essential to realization of the rule of law in nation building and in robust open market societies. We have witnessed the expression of this idea in all post World War II economic development after Bretton Woods, in international aid agencies, the World Bank, and IMF, in the public and private models of leading aid agencies, and all forces of international investment and finally in the mission of US agencies, including especially USAID and the US Army.

Max Hastings on the role of the U.S. Army recently wrote:
"I share … the belief that the armed forces must be reconfigured, to provided effective civil support in the wake of conflict. The old US army view that "we don't do nation building" has been a significant contributory factor to failure in Iraq. The first duty of soldiers is to fight, not kiss babies. But every man who has served in Iraq or Afghanistan recognizes the indispensability of committing engineers, doctors and above all policemen behind the tanks. We shall never get military interventions right anywhere in the world, until we commit stabilizing forces to secure societies.[2]

[1] The World Bank Research Observer, vol. 13, no. 1 (February 1998), pp 1-11;
see also Kenneth Dam, "The Law Growth Nexus, The Rule of Law and Economic Development", p 93, 2006.

[2] Terror and Consent: The Wars for the 21st Century, by Philip Bobbitt, reviewed by Max Hastings, 6/1/08, *The London Times*

Fortunately Hastings' views are now somewhat passé: The recent "surge" in Iraq represents the inclusion of "stability operations" on equal footing with offense and defense operations of the U.S. military.

In all these initiatives, the ideal is independent judicial oversight of executive/legislative action in "cases and controversies", consistent with a durable constitutional framework, consistent over time, consistent with respect for individual rights accompanied by disclaimers of self interest, cronyism of social and economic and government elites, high office thuggery, and political patronage.

Out of this process and the global experience, criteria for a <u>defective</u> free market legal system have also been recognized in the practice of international development lawyers. Signs of such defects include:

1. A citizenry and judiciary branch that have no respect for the rule of law
2. Widespread corruption among judges
3. Evidence that a judge has no respect for the concept of "<u>stare decisis</u>" or precedent in reviewing private transactions and the rights of the private and public parties

Personal experience in Mexico, Panama, Russia, Poland, Czech., Hungary, Germany, U.K., Algeria, Indonesia and pre-revolution Iran, some involving railroad and large project infrastructure and some involving privatized or soon to be privatized financial institutions, is consistent with these observations. One situation in particular involved a Mexican "bench warrant", issued at the behest of a local partner, for the arrest and detention of representatives the US partner, in an attempt to secure an advantage in their partnership (shades of Russia, and the experiences of British Petroleum and Heritage Fund, with which you may be familiar.)

The "rule of law" regime is as important domestically as it is in the world market. We have learned valuable lessons from the international experience and they need to be remembered and applied in this country. Since, as we are

told, 90% of fixed investment around the world is domestic, observations as to the rule of law as the essential underpinning of domestic economic development apply equally to the U.S. as to the so called underdeveloped and emerging nations.[3]

From the "beginning" the U.S. was the pioneer and the model for the independent judiciary as part and a guarantor of a durable constitutional system. In the process of refusing to accept Congress's grant of authority to issue writs of mandamus, Chief Justice Marshall recognized in *Marbury v Madison* a greater power for the Court: that of judicial review. He said, "It is emphatically the province and duty of the judicial department to say what the law is…This is the very essence of judicial duty" and thus the "rule of law". We take for granted the landmark status of this case but it was also greatly admired by Alexis de Tocqueville and has been cited in judicial decisions in India, Italy, and Japan as well.

For Tocqueville this pronouncement is a part of two important achievements of the democracy in America: First, separation of church and state, freedom of speech, freedom of association, which altogether in the First Amendment are the essential underpinnings of freedom of conscience and individual autonomy and resulting innovations in enterprise and association; second, the independent judiciary with life time appointment for judges as guarantors of these rights.

The independent judiciary with the power of judicial review was a departure from the practice that prevailed in England at the time of the Revolution and from the monarchial practice Tocqueville observed in pre-Revolutionary France. His last book, The Old Regime and the Revolution, emphasized the lack of an independent judiciary as a defect in the administration of justice in the Old Regime. There he observed that the monarch/executive was troubled

[3]Ghemawat, Harvard Business School, 2008 reported by Brode, *New York Times*, 5/2/08

by an independent judiciary; that the judiciary became a target of tactics to undermine it, leading to the usurpation of the rule of basic law by the monarchial bureaucracy. The "rule of law" in the Old Regimes was frustrated by the absolutism of the monarchs and their arbitrary decrees and the officers

who enforced them. He concluded that one of the chief contributions of America to political science was to subject the state and its rulers to ordinary courts and the common law.

But, similar challenges were also observed in the U.S. Tocqueville wrote in 1831 that there is a … "hidden tendency in the U.S. leading the people to diminish judicial power" … "by diminishing the magistrates' independence, not judicial power only, but the democratic republic itself has been attacked".

Even when partisan selection systems are abandoned, executive and legislative branches seek to control the judiciary, starving it of needed resources, especially competitive compensation and retirement benefits and attempting to limit its jurisdiction.

So how does one get and preserve an independent judiciary, this fundamental building block of the "American system" and the rule of law that ensures economic development.

In 1941, in response to a citizen driven initiative petition drive and over the objections and resistance of the Missouri legislature and governor, the Missouri Constitution was amended to abolish partisan judicial election and to adopt the Missouri Nonpartisan Court Plan. This change was prompted by partial control of judicial appointments by city bosses in St. Louis and Kansas City, working through the governor. The very next year the Missouri legislature attempted to undo the amendment but failed. The essence of the Missouri Plan has since been adopted in 30 states. Attacks have continued, however; yet another attempt funded in part by out of state money, to restore gubernational primacy and patronage in judicial selection, was beaten back in Missouri this year.

Missouri has also made some progress ensuring appropriate compensation for the judiciary, again by citizen led initiative and approval. The Missouri Constitutional Amendments of 2007 established a citizens compensation commission, the recommendations of which become law after reasonable

opportunity for review by the legislature, but requiring a "super majority" vote of the legislature to over- ride the commission's recommendation.

Incidentally, if one compares judicial compensation in the U.K. to that in the U.S., the House of Lords judges (equivalent to the Supreme Court) are paid 188,000 pounds a year, Appeal Court judges 180,000 pounds a year, higher court judges 160,000 pounds a year, and ordinary judges about 100,000 pounds a year. At current exchange rates these pay levels are roughly equal to $376,000, $360,000, $320,000, and $200,000 per year, respectively, certainly higher levels than prevail in U.S. courts.

Support for clerks' offices and administrative functions -- the infrastructure of the judicial system – require similar vigilance.

The hazards of unfettered executive appointment have been noted. Alexis de Tocqueville's experience with such hazards led him to praise the U.S. independent judiciary of the federal courts, with lifetime appointment, uniquely responsible under Articles III and VI for continuity and adherence to our constitutional system.

Tocqueville also observed there are equal hazards in systems picking judges through an election process. Those hazards have grown as the costs of such elections have "skyrocketed" and the collateral damage from such elections is expressed in defamation actions brought by judges and controversies over the application in elections of judicial codes of conduct.

Since the Constitution was adopted when only Vermont elected its judges, many states have adopted the election process for judges. There is, however, little or no control over who runs for judge. The candidacy of a Georgia fire extinguisher salesman is a recent example of the perils of letting all comers run without professional qualifications.

In addition to tests of qualification, which may be absent, there is the question of money and election finance. In many such races the candidates raise millions of dollars for their race, often from out of state interests. In 2006

$13.4 million was raised in Alabama Supreme Court races; a Wisconsin high court race in April of this year cost $5.9 million. Thus, it is ironic at best for a justice of the Alabama Supreme Court to argue in the August 6 *USA Today* for the election of judges as the superior means of choosing judicial officers.

One may argue that the American constitutional system should not accommodate an elected judiciary at any level. Recent surveys using an index, developed by the Institute for Legal Reform, support the finding that partisan judicial elections are bad for an economy, economic growth and job creation. The survey focuses on 10 factors, including scientific and technical evidence, impartiality and competence of judges, and predictability and fairness of juries. The index is correlated with per-capita income and other measures of economic performance across states, to conclude that states scoring better in this index have a legal climate more conducive to economic growth and prosperity. The authors Joshua Hall and Russell Sobel are responsible for this "only empirically based index that exists across states and through time."

This unprecedented study of judicial selection systems concluded that states with the Missouri Plan had legal climates with statistically better economic rankings than states using partisan elections, non-partisan elections, and gubernatorial appointment even with legislative confirmation. This study is the first to confirm domestically lessons reviewed, and practiced, in our world wide teaching of the rule of law. Not surprisingly these findings also confirm the support for the rule of law and its guarantees by an independent judiciary in "off shore" economic development.

Protecting private property and minority rights from the interests of the newly empowered public governments became a major problem of democratic governance. Madison in Federalist 81 had anticipated this issue and, even before the Constitution was adopted, the belief was widespread that only the judiciaries in America were impartial and disciplined enough in matters of self interest to solve that problem and to defend rights and property from elites and from interested popular majorities. [4]

The hazards – substantive and procedural – of an elected judiciary are widely observable and these hazards prompt a fresh recognition of the ultimate supervisory role of the federal courts in a federalist system. Two relatively recent litigations – one in Illinois, Thomas v Kane County Chronicle, and one in Massachusetts, Murphy v Boston Herald, – illustrate the challenges created by an elected judiciary for civil institutions and civil society. Both cases arose from defamation cases filed by state court judges, one a trial judge, one a state Supreme

Court judge, against newspapers, one being a small weekly Illinois paper, the other a major metropolitan daily paper in Boston. Both cases resulted in substantial verdicts for the
judges in state court trial and appeal processes that appeared tainted by the direct and indirect interference or influence of the plaintiff judge and his fellow judges to the detriment of the defendants. This talk is not the place to review the cases in detail, but the outcomes were ultimately tested by Article III federal courts in complaints filed under 28 USC §1983. Before federal trial of the claims of denial of due process in the State court proceedings, settlements were negotiated, essentially dictated by insurance carriers at reduced amounts. Both cases illustrate the pressures and predictable conduct of judges who are and want to be elected and re-elected.

They also illustrate the effects on judges drawn into the overtly electoral and political process and their compromise with the dispassionate, nonpolitical professionalism which characterizes the judicial function in the most admired constitutional systems. This politicization of the judiciary deprives it of the moral and practical authority to ensure that the other branches of government and their administration are free of corruption and self dealing that makes the likes of Russia depart from the rule of law, and the economic development model it drives.

[4] Gordon Wood, Radicalism of American Revolution, p 323

As with other state agencies which appear to fail to meet standards of due process, federal courts take on supervision of problem state agencies to ensure constitutional performance of state prison systems, foster care systems, school systems, police departments and housing authorities among others. Under

some circumstances one may envision that state court systems -- especially where politicized in an extensive, even exaggerated, electoral process for the judiciary, as in Illinois, by unlimited political contributions -- may warrant federal court supervision.

A “pay to play” culture, with its attendant kickbacks, bribery and insidious variations, permeates an entire economy, high and low; it infects all offices -- legislative, executive and their administrators. Only an independent judiciary and ultimately the Article III courts in a US style constitutional system, their judges and their culture can be counted on to prevent it.

Article III courts are the ultimate watchdogs of a federal system which allows experiments in judicial selection but which also guarantee protection of those underlying and fundamental principles essential to an open and successful marketplace, here and abroad. In this realization there is a perfect alignment of courts and businesses.

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