

REFLECTIONS
(Business Law Section, January, 2006)

This is my first meeting with you as a Business Law Advisor. In truth, I have little notion of what the job entails; my experience with business law is confined to one year's associateship with a burgeoning law firm then known as Arnold, Fortas & Porter back in 1952 when it had 10 partners and 2 associates (paid \$4,000 a year). A splattering of business cases did find their way into the D.C. Circuit through diversity jurisdiction, and the ALI spent several years angsting over the Corporate Governance Project as well as numerous joint endeavors on the UCC. I was a fairly active member of the Administrative Law Section of the ABA for a time, but I'm not sure that counts. I figured you must have chosen me for that ephemeral "outsider's" view—sort of like the idealized role of the independent corporate board member (as we have found out, some cut the mustard, some don't) only there's no Sarbanes/Oxley oversight here (I trust). My perplexity was accentuated recently when I received a copy of the agenda for this meeting with a surprise entry labeled Professional Reflections (no time slot mentioned) with my name attached. Ominously it was accompanied by a detailed manual on the use of powerpoints. I don't do powerpoints, and I can barely handle my e-mail (I have even contemplated asking NSA for help in retrieving and discerning patterns in

it). In any case, apologies now having been given, I will embark on a mercifully brief set of reflections.

Actually, I do have my own powerpoints—two of them. But they are powerpoints in the broadest sense, dealing with how we lawyers carry on our trade and contribute not only to the preservation of commonly-held values in our own democratic society—even in time of crises and war—but to their introduction abroad. Business and trade, we all know, are the glue not only of domestic intercourse but of globalization; what your clients do and how you advise them are surely as critical to our country's role in the world as the laws our legislators pass and the executive orders that flow so copiously from our Energizer-Bunny-like bureaucracy. Over the past two decades I have traveled frequently to Eastern Europe, Eurasia, and the Far East, usually on idealistic missions to spread the rule of law or advance the concept of judicial independence in nations newly emerging from the Soviet bloc or from brutal civil wars that have destroyed their infrastructure and laid waste to their human and natural resources. Everywhere I went the foremost desire was for more foreign business, more investment, more trade. Development experts, I think, are in reasonable agreement on one thing—with economic growth comes, maybe not automatically but with some care—a far greater potential for better health, education, women's and

minority rights, and most important, political and ethnic tolerance. Without an upswing in economic opportunity the principle indicia of democracy and rule of law—fair elections, respect for human rights—are vastly difficult—almost impossible—to achieve. Ten years after the Dayton Accords, Bosnia struggles despite enormous outside contributions to rebuilding its social and political infrastructure to make inroads on its residue of ethnic resentments that erupted in the brutal wars of the early nineties. Many say that gap may be traced—at least in part—to its stagnant economy. Social and political progress in Eastern Europe is erratic but roughly follows lines of economic development. Africa remains a brooding omnipresence to world stability, because of its overpowering needs and history of oppression, but its best hope lies in economic revitalization.

The old saw of “Give a hungry man fish and he’ll still be hungry tomorrow; give him a fishing rod and he’ll be on his way to making a living” resonates on the world scene as well. The obligations of American business—and their lawyer-advisers—to contribute to world peace and through peace to our own national security are so obvious as to border on the banal. But, as with so many simple things, they can be profoundly complicated in execution.

There is the Lou Dobbs phenomenon, not to be dismissed lightly—the negative effects of job outsourcing on our own working class citizens; that delicate balance between promoting free movement of labor and capital and fulfilling domestic responsibilities is not only one that must be addressed more sagely by our national leaders but one that has to be considered by many of your clients individually in their own right. Just as crucial is the way American business plies its trade abroad. Does its presence in another country encourage better business practices, more responsible attitudes toward workers and consumers in that country by example and persuasion or does it simply join in the too-widely accepted practices of corruption, paybacks, labor and environmental exploitation that unfortunately have too often characterized so much of foreign business engagement with underdeveloped countries in the past? Let me give just one example with which I have some familiarity. That is the endemic problem of judicial corruption—a plague that insidiously invades much of the world outside our own and a few other developed countries. No one—not the World Bank nor ambitious foundations or even reform-minded governments seem yet to have gotten a handle on it. In poor countries, people pay to become judges and they continue to carry on the tradition of “pay as you go” after they don their robes. Surveys have shown that judicial corruption is the most scorned of all

corruption by ordinary people in those bedeviled countries and the cause of the greatest cynicism toward justice reform efforts of all kinds. Ironically, judicial corruption is also a major obstacle to foreign investment and trade in these same countries; you lawyers, above all, know how risky trade and business would be in our own country if the courts were not there as a last resort or (some might say) threat and if the value of agreements or even laws were dependent upon elaborate backdoor schemes of secret payments. Where there are no fair and impartial judges to enforce business transactions, there will be no fair and impartial judges to prevent election fraud or labor laws or environmental protection or even protection from domestic abuses.

My first powerpoint—as it were—is simply that American business and their lawyer-advisers are, and must recognize themselves as, players in this global endgame; critical players in enhancing investment and business opportunities in these woefully insecure faraway places at the same time they eschew complicity in the corruption that has too frequently accompanied business transactions in those places, particularly in the courts. It is not an easy assignment but in the aggregate of all your clients one with potentially revolutionary results.

For the integrity of our courts is one of the blessings of our system of government, warts and all. Judicial corruption, while not unknown, is relatively rare in the States; that merciful absence is a part of our way of life we can export abroad without apology or accusation of hypocrisy. Foundations and international organizations, even governments, can't do it alone. Business and trade is where it is at in these economically struggling countries; yours are the voices they listen to, yours are the achievements they admire and want to imitate.

The American Bar Association's Rule of Law Symposium in Washington last fall focused on several aspects of this discussion: First, the interdependence between economic growth and governance; they need each other to thrive; rule of law governance structures are especially important to "prevent ruling elites in resource rich countries from enriching their lives at the expense of the general public"—too often those elites have made their separate deals within or at least with the knowledge of their foreign business and investor partners. The Symposium concluded there was "little doubt that well-functioning legal systems are highly conducive to business and economic development, and that the converse—unstable, unreliable or corrupt legal systems—stymie development." Rule of law improvements weaken corruption according to a World Bank study; control of corruption in

turn is linked to better governance and respect for human rights. Weak courts make it impossible to hold corruption in other sectors accountable.

What can the private sector of American businesses do about corruption abroad? They are on the ground and they see it happen. They can identify specific problems and share this knowledge with other businesses or reform groups and international organizations; they can use their influence with foreign governments to establish higher ethical standards as a matter of law and to enforce them. They can train ambitious and idealistic young comers from those countries in good and honest business practices by exchange programs and internships. Paramount, they can refuse to be a part of corrupt practices. Some businesses have funded anti-corruption programs and helped train judges or helped draft legislation that improves rule of law generally and in their special areas of concern.

My second powerpoint pertains to the role of the business community and their legal advisers in preserving the integrity and the vitality of our courts at home. It is a fact that of all the features of American polity we have exhorted and exported abroad to fledgling democracies (that includes separation of powers, bicameralism, even our special brand of federalism) an independent and forceful judiciary has been the only one that has been enthusiastically embraced (at least in theory)—it is the crown jewel in our

arsenal of governance tools. Yet, responsible groups on both sides of the political spectrum worry today about forces in our own political scene that place the independence and the power of the courts at risk. Unlike foreign judiciaries, the threat is not bribery or corruption but marginalization. A forthcoming conference, spearheaded by two Supreme Court Justices, has been convened to explore those risks and how the indispensable role of our courts can more effectively be brought home to our citizens and to the media. The legal and business community is key to that effort.

Right now, the ordinary newspaper reader or more likely listener to radio network and cable TV (not to mention the internet and blogs) is treated to a barrage of critical commentary on the evils of “activist judges.” “Activist judges,” we are told, are those who rule according to their own personal or ideological preferences and do not limit their sources to constitutional (or statutory) text and precedents. Such judges—we are told—lack the “modesty and restraint” appropriate for unelected officers in a democratic society. Backing up such accusations, there are bills in Congress to strip federal courts of jurisdiction over controversial cases involving abortion, gay marriage, life-termination decisions. One bill has already been enacted into law taking habeas corpus jurisdiction away from the federal courts to decide whether a detainee at Guantanamo is an enemy combatant

in accordance with recent Supreme Court doctrine or has been subjected to torture or inhumane treatment while detained. (Elected state judges are chronically in worse situations since they can and often are thrown out of office for deviation from popular norms.) The latest wrinkle in judicial downsizing would restrict federal judges from looking at foreign law in constitutional decisionmaking (the rationale being other countries have different charters, different institutions, different histories, and our forefathers meant our unique Constitution to be interpreted by our judges only in the context of our own history and practices). Some Supreme Court decisions have, however, cited foreign judgments and declarations of foreign governmental bodies as evidence of the “opinions of mankind” in deciding questions like the imposition of the death penalty on the mentally ill or juveniles, or the use of affirmative action as a remedy for racial discrimination.

Several of the Justices have spoken out in favor of the practice of looking abroad, pointing out that they do so only for the persuasive value of foreign jurisprudence, never relying on it as the basis for a judgment. To many the drive to keep judges confined to reading only American law is another example of a more generalized movement to circumscribe their discretion.

These debates are symptomatic of a bigger and deeper division today about the role of judges in our democratic society. Recent confirmation hearings underscore those divisions and their frequent exploitation by political and social self-interest groups on both sides of the issue. The baptism by fire that all judicial candidates undergo is enough to and has in truth discouraged many qualified men and women from even trying for judgeships (that and comparatively low salaries—my law clerks made more than I did within a year or two of leaving their clerkships). Judicial jobs threaten to become accessible only for those who are well-to-do and have never cared passionately enough to speak out about any social problem or controversial legal issue. From the beginnings of our history, politicians—even the best—have been caustic about judges whose decisions they opposed; witness Jefferson heaping scorn and calumny on Federalist judges in the early 1800s. But communications technology has upped the ante a thousand-fold since then; a well-financed campaign against a judicial candidate regardless of its merits can too often fell his (or her) chances of confirmation unless supporters can counter with an even better-financed one.

We pride ourselves, justifiably, on transparency in our judicial selection process, but transparency and responsibility must go hand in hand. The press needs not to report less but to investigate more and to take enough

time to put soundbites in context; it needs, too, to focus on the judicial product and the principles and processes by which judges make decisions rather than their detractors' labels. Here lawyers and businesses who themselves need the courts to provide continuity and stability in their relationships can play supportive roles in encouraging more balanced media coverage on the work of the courts, in discouraging irresponsible attacks from groups and policymakers with whom they have contacts themselves; and, when appropriate, directly expressing their views on issues of national or regional import affecting them by way of amicus briefs in court cases. Above all, they can avoid adding to the clamor against the courts that does not result in reasoned analyses of disputed decisions but rather in adjectival slurs and slights.

There are, of course, legitimate arguments to be made about particular decisions and ways in which judges go about interpreting the Constitution. Thus, Justice Scalia writes of "textualism" as an exclusive guide to constitutional interpretation and scores the judges who do not find it adequate, while Justice Breyer advocates for judicial interpretations that take account of predictable consequences on society—specifically ones that advance democratic values, people's ability to govern themselves and participate in the political discourse of the country. But the too ready resort

to labels like “activism” or “imperial judges” obscures debate on these legitimate issues. Thus, many who say they abhor “activism” have cheered a majority on the Court in striking down in the name of “the new federalism” over 30 federal regulatory laws in the last decade—more than in any prior period in history. Congress has been unhappy about this scorecard as have been public interest groups concerned that important environmental and social regulation will be struck down. Some already have, although of late it has become increasingly difficult to discern which enactments will pass the test and which will not. For instance, gun control laws targeted at school areas and parts of violence against women legislation have been held outside Congress’ power but federally mandated leave for state employees has been given a pass as have federal drug laws that override state laws allowing prescription use of marijuana for terminally ill patients. The states have not always sought greater power in the same domains in which the Court wishes to bestow it and conversely Congress and the courts have refused regulatory power which the states want. The Endangered Species Act and assisted suicide are test cases pending in the Court right now. At stake, according to one commentator, is the power of Congress to address national issues unless they can be classified as purely commercial or economic.

This is a time when, some say, the newly-reconstituted Court will have to confront the shakiness of its past jurisprudence and redefine its relationship with the other branches, as it did with Congress and the Executive in the New Deal period and with the states in the civil rights era of the sixties. “Modesty and restraint” may not be enough to carry the day for the Judiciary which after all was securely fitted into the separation of powers triumvirate by our Founding Fathers in order to protect individual rights from excessive majoritarian pressures from the political branches and to police the critical separation of powers foundation of our government.

In short, there are legitimate debates to be had about the direction in which the courts should go in issues of national and local polity and what modes of interpretation they should exercise, but the debate needs to be on the merits of those issues not broad-based attacks to cut back on the traditional power of the courts to even consider those issues. Attempts to make one branch primus among peers—even in wartime—and to exempt it from any judicial oversight will leave lasting dents in our constitutional firmament. It should be remembered that the famous *Steel Seizure* case in 1952, involving President Truman’s seizure of steel mills in the name of national security, arose in an industrial context and his rejection came at the hands of the Court. Business continues to have an important stake in the

integrity and power of the courts to oversee the exercise of delegated governmental functions by all branches of government.

I hope I've not been too serious for a maiden appearance. If so, I apologize; in the future, I'll try to stay more earth-bound. You have, however, been an indulgent audience and I appreciate your listening to my Reflections in these serious times.

Thank you.