

PROMOTING THE RULE OF LAW AND RESPECTING THE SEPARATION OF POWERS: THE LEGITIMATE ROLE OF THE AMERICAN JUDICIARY ABROAD

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INTRODUCTION

The rule of law¹ is fundamental to the freedom enjoyed in the United States today. John Locke explained its essential nature well before the Revolutionary War:

Freedom of men under government, is, to have a standing rule to live by, common to every one of that society . . . a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.²

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1. Professor Toni M. Fine of Fordham University School of Law gives an apt definition of the rule of law:

In essence, rule of law refers to having rules that are established, known, accepted, and respected—by both government and non-government actors. Rule of law invokes a predictable legal system with fair, transparent, and effective judicial institutions to protect citizens against the arbitrary use of state authority and lawless acts. Rule of law also implies a set of procedures and processes for the resolution of disputes that are accessible and fair to all. Rule of law is considered to be a cornerstone of a well-functioning democracy.

Sidney B. Brooks, *Building Blocks for a Rule of Law*, COLO. LAW., Dec. 2007, at 19, 19–20 (quoting Toni M. Fine, Professor, Fordham Univ. Sch. of Law, Speech in Lagos, Nigeria: Rule of Law and Sustainable Democracy (Oct. 2005)).

2. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 284 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (emphasis omitted and capitalization modernized).

Yet, the rule of law so central to American democracy today has deep historical roots, which long precede even Locke's lifetime. In ancient Greece, Aristotle considered a variety of constitutions before concluding that "it is more proper that the law should govern than any of the citizens."³ During our nation's infancy, Thomas Paine wrote in *Common Sense* that "the world may know that, so far as we approve of monarchy, that in America *the law is king*. For as in absolute governments the king is law, so in free countries the law *ought* to be king; and there ought to be no other."⁴ John Adams later memorialized this principle when drafting the Massachusetts State Constitution of 1780, declaring "to the end it may be a government of laws, and not of men."⁵ While it was clear the rule of law would play a central role in the federal government following the Revolution, the Founding Fathers deliberated carefully for eleven years before incorporating it into the Constitution in a way that would thwart tyranny and best achieve a free, yet ordered, society.⁶ The success and stability of our nation today flows, in large part, from our faithful adherence to the rule of law.

3. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 165 (1960) (internal quotation marks omitted) (quoting ARISTOTLE, *POLITICS*, Bk. 3, Ch. 16 (Ernest Rhys ed., William Ellis trans., E.P. Dutton & Co. 1912)).

4. Thomas Paine, *Common Sense* (1776), reprinted in *COMMON SENSE AND OTHER POLITICAL WRITINGS* 3, 32 (Nelson F. Adkins ed., Liberal Arts Press 1953).

5. MASS. CONST. of 1780, art. XXX, reprinted in *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES* 956, 960 (Ben. Perley Poore ed., 2d ed., Washington, Gov't Printing Office 1878); see 1 PAGE SMITH, JOHN ADAMS 439–40 (1962) (relating that the Massachusetts Constitution of 1780 was "Adams' handiwork").

6. Professor Calabresi of Northwestern University School of Law explains:

In sum, our rule-of-law-securing Constitution of 1787 gestated over an eleven year period from 1776 to 1787 and emerged as a compromise between the English colonial regime and the decentralized regime of the Articles of Confederation. The critical balance between order and freedom which was struck in our Constitution was driven by two nightmares that have haunted Americans ever since. The first nightmare, associated with 1776, is the nightmare of the distant imperial tyranny with an all powerful executive. The second nightmare, associated with 1787, is the nightmare of the local or village tyrant and of the all powerful rights-invading democratic legislature. Our Constitution of 1787 sought to secure and promote the rule of law by protecting against both of the nightmares. That the Framers succeeded so brilliantly suggests that the eleven year gestation period of our Constitution may have been crucial to striking the right balance between order and freedom.

Steven G. Calabresi, *The Historical Origins of the Rule of Law in the American Constitutional Order*, 28 HARV. J.L. & PUB. POL'Y 273, 279 (2004).

In addition to its central and vital role in any strong democracy,⁷ the rule of law has been described as an “unqualified human good.”⁸ It stands alone in terms of its extensive international endorsement.⁹ There is a wide consensus among the international community that democratic values, including the rule of law, should be universal—furthered in all nations—because these values preserve and protect human dignity, facilitate accountability in government, and allow access to the political process.¹⁰ Reflecting its own growing commitment to fostering democracy abroad, the United States has formally incorporated rule-of-law promotion in its foreign assistance efforts in conjunction with traditional monetary aid.¹¹ The rule of law is increasingly considered one of the most valuable American exports to developing and transitioning nations.¹²

Effective administration of the rule of law requires an independent, transparent, and accountable judiciary.¹³ Because of the

7. Dawn Bennett-Ingold, Note, *Latin American Democracy: Flourishing or Floundering?*, 28 GA. J. INT'L & COMP. L. 111, 139 (1999) (“[A]n enforceable, compulsory, and foreseeable rule of law’ is an essential foundation for a strong democracy.” (quoting Edgardo Buscaglia, *Obstacles to Judicial Reform in Latin America*, in JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA 15, 15 (Edmundo Jarquín & Fernando Carrillo eds., 1998))).

8. E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 266 (1975).

9. Brian Tamanaha of St. John’s University has observed that “[n]o other single political ideal has ever achieved global endorsement.” BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 3 (2004).

10. The United Nations Development Programme’s Human Development Report, issued in 2002, asserts that democracy, including accountable government and political freedom, is “essential” to human development, describing it as the “only political regime compatible with human development in its deepest sense, because in democracy political power is authorized and controlled by the people over whom it is exercised.” U.N. Dev. Programme [UNDP], Team for the Preparation of Human Dev. Report 2002, *Human Development Report 2002: Deepening Democracy in a Fragmented World* 55 (2002).

11. For example, President George W. Bush in his first term incorporated significant democracy promotion into the development efforts of his Administration, expanding upon the prior Administration’s policy. He declared foreign development to be a central commitment of U.S. foreign policy and introduced the Millennium Challenge Account, providing funding as an incentive to nations “that root out corruption, respect human rights, and adhere to the rule of law.” Remarks at the Inter-American Development Bank, 1 PUB. PAPERS 411 (Mar. 14, 2002), quoted in Jennifer Windsor, *Democracy and Development: The Evolution of U.S. Foreign Assistance Policy*, FLETCHER F. WORLD AFF., Summer–Fall 2003, at 141, 145.

12. *E.g.*, Keith B. Norman, *Our Greatest Export: The Rule of Law*, 60 ALA. LAW. 150, 150 (1999).

13. In *United States v. United Mine Workers*, Justice Frankfurter explained, “There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process.” 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring in the judgment).

experience and expertise our federal judges gain in their domestic role, they are well positioned to promote the rule of law abroad.¹⁴ And indeed, federal judges have played a significant role in the effort to advance the rule of law and the democratic values essential to it in other parts of the world.

Each year, dozens of federal judges assist in presenting seminars abroad that educate and train judges in other countries on a host of topics including how to oversee a case, how to write an opinion, and the importance of impartiality. I have had the privilege of participating in at least a dozen such programs. Beyond the exhilarating human experiences these programs have provided me, I have gained some background in their structure, objectives, and efficacy. My experience has also given me reason to pause and consider some of the tensions created by the participation of the federal judiciary in efforts to promote the rule of law abroad. One of the more sensitive concerns relates to the federal judiciary's involvement in matters that touch upon foreign policy, a province conferred by the Constitution to the politically accountable branches of government.¹⁵ Judicial participation in these efforts may also raise questions concerning government funding and compliance with judicial ethical obligations. That said, clearly defined roles for participating judges coupled with cognizance of these tensions will allow these important efforts to continue in a manner that maintains the delicate separation-of-powers balance and comports with the Canons of the Code of Conduct for United States Judges.¹⁶

This Article will proceed as follows: Part I will outline the historical development of American rule-of-law programs and democracy promotion efforts abroad. Part II will explore the specific challenges faced by developing and transitioning nations as they work to establish the rule of law and democratic systems of government. Part III will describe the structure and nature of the

14. Peggy Ochandarena & Louise Williams, *Federal Judicial Involvement in International Development*, JUDGES' J., Summer 2003, at 11, 46 ("Judges make especially effective messengers to other judges. The unappealing medicine of reform may go down easier when prescribed by individuals who practice their own medicine.").

15. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the 'political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."). Beyond limited judicial review in appropriate circumstances involving foreign relations, foreign policy remains an executive function. See *Baker v. Carr*, 369 U.S. 186, 211–13 (1962).

16. See generally CODE OF CONDUCT FOR U.S. JUDGES (Judicial Conference 1993).

current national and international rule-of-law promotion programs in which federal judges are involved. Finally, Part IV will address the tensions raised by the involvement of the federal judiciary in these efforts and attempt to outline a responsible approach whereby these efforts can continue in a way that maintains judicial independence, satisfies judicial ethical standards, and comports with basic separation-of-powers principles.

I.

Perhaps because of the debate regarding nation-building in Afghanistan and Iraq, a common misperception exists that programs promoting the rule of law and democracy abroad are a recent development. They are not.¹⁷ The relationship between economic development and legal development is not a new phenomenon.¹⁸ Since at least the 1960s, the legal community has advocated democracy and rule-of-law promotion as the United States has placed a greater emphasis on nation-building. This may be because Americans perceive the law as “the proper medium for social reform.”¹⁹ We often view “[t]he civil rights or public interest lawyer [as] the protagonist of a drama which is variously perceived as ‘achieving social justice through law,’ ‘reforming the system,’ [and] ‘righting the wrongs of society.’”²⁰ American commitment to promoting democracy abroad became clearer upon its incorporation into the nation’s foreign policy during the last half of the twentieth century.

During the latter stages of the Cold War, the Reagan Administration explained its intention “to foster the infrastructure of

17. See generally JAMES DOBBINS ET AL., *AMERICA’S ROLE IN NATION-BUILDING: FROM GERMANY TO IRAQ* (2003) (outlining seven historical cases of American efforts to promote democracy abroad since World War II).

18. See, e.g., ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 643–44 (Regnery Publ’g 1998) (1776) (explaining the connection between the rule of law and economic prosperity); Kristen E. Boon, “Open for Business”: *International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law*, 39 N.Y.U. J. INT’L L. & POL. 513, 514 (2007) (acknowledging the role of the rule of law in economic development); Windsor, *supra* note 11, at 142 (“[D]emocracies, even economically poor democracies, are more prosperous than non-democratic regimes.”).

19. John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 466 (1977); see also Thomas M. Franck, *Commentary, Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh’s Optimism*, 35 HOUS. L. REV. 683, 693 (1998) (“Law [in America] is seen . . . as an acceptable forum for the resolution of profound political, social, and cultural disputes. In this respect we are different from other legal cultures.”).

20. Merryman, *supra* note 19, at 466.

democracy, the system of a free press, unions, political parties, universities, which allows a people to choose their own way to develop their own culture, to reconcile their own differences through peaceful means."²¹ Although the promotion of democracy began as a means to stem the tide of Soviet Communism, it soon became a broader vehicle, facilitating efforts such as electoral reforms in Latin America.²²

These efforts to promote democracy abroad were only further encouraged after the fall of Communism. The end of the Cold War presented a new opportunity for the United States to foster democracy as a type of foreign assistance, distinct from simple monetary aid. After the fall of the Berlin Wall, Congress passed the Support for East European Democracy Act²³ and the Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act.²⁴ Each was an attempt to provide not only monetary aid to Eastern Europe, but also to foster the rule of law and democracy.²⁵ For the former Communist countries making the transition to democracy, words of Winston Churchill come to mind. Addressing Congress shortly after the bombing of Pearl Harbor, he noted: "I was brought up in my father's house to believe in democracy. 'Trust the people'—that was his message."²⁶ It is this trust of democracy, and the citizens who live under it, that has motivated the United States to promote change in these countries.

In 1990, the United States Agency for International Development ("USAID")²⁷ began promoting its Democracy Initiative. The new

21. Address to Members of the British Parliament, 1 PUB. PAPERS 746 (June 8, 1982), *quoted in* THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 31 (1999).

22. William P. Alford, *Exporting "The Pursuit of Happiness,"* 113 HARV. L. REV. 1677, 1683 (2000) (book review).

23. Support for East European Democracy (SEED) Act of 1989, Pub. L. No. 101-179, 103 Stat. 1298 (codified as amended in scattered sections of 22 U.S.C.).

24. Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act (FREEDOM Support Act) of 1992, Pub. L. No. 102-511, 106 Stat. 3320 (codified as amended in scattered sections of 7 U.S.C. and 22 U.S.C.).

25. Windsor, *supra* note 11, at 143.

26. Winston Churchill, *A Long and Hard War*, Address Before a Joint Session of Congress (Dec. 26, 1941), *in* 6 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES 1897-1963, at 6536, 6536 (Robert Rhodes James ed., 1974).

27. Congress provided for the creation of the U.S. Agency for International Development in the Foreign Assistance Act of 1961. See Pub. L. No. 87-195, 75 Stat. 424, 445 (codified as amended in scattered sections of U.S.C.). Later that same year, President Kennedy established the agency to administer economic and social development assistance to developing nations. Exec. Order No. 10,973, 26 Fed. Reg. 10,469 (Nov. 7, 1961); see also U.S. Agency for International Development, http://www.usaid.gov/about_usaid/usaidhist.html (last visited Sept. 27, 2008).

agency observed that “there is growing evidence that open societies that value individual rights, respect the rule of law[,] and have open and accountable governments provide better opportunities for sustained economic development than do closed systems [that] stifle individual initiative.”²⁸ The programs born of the Democracy Initiative have sent hundreds of judges to countries around the world, promoting the rule of law.

II.

Before discussing the challenges faced by emerging democracies, it is helpful to first consider what we take for granted here in the United States. Our judicial systems, both federal and state, are immensely honest and open. They have, throughout our history, been so free of systemic corruption that the rare and unfortunate cases that have occurred are aberrational—and are viewed as such.²⁹ Beyond institutional integrity and a high level of legal competence, American judges, especially federal judges, enjoy institutional independence. Once in office, we are isolated from the forces of partisan politics.³⁰

In many developing countries, the strong and independent judiciary so central to the rule of law simply does not exist. Oftentimes, the judiciaries in emerging democracies have been closely overseen, if not directly run, by executive powers.³¹ They struggle in their attempt to transition from an arm of the executive into a separate and distinct branch of government, founded on the rule of law. This is particularly true in former Soviet-bloc countries that operate under civil law systems. The role of the prosecutor in those countries is much more powerful than in our own, and the role of the judge is,

28. USAID, DEMOCRACY INITIATIVE 2 (1990).

29. See, e.g., John J. Chung, *Promissory Estoppel and the Protection of Interpersonal Trust*, 56 CLEV. ST. L. REV. 37, 56 n.51 (2008) (“From a global, bird’s-eye perspective and in comparison to some other legal systems, there is no doubt that the American legal system is based on the rule of law, offers predictability, and is free of systemic corruption.”).

30. Article III judges have life tenure and salaries that may not be reduced. U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

31. In these nations, governments often manifest a rule *by* law rather than the rule *of* law—in that their legal systems are used to centralize power rather than to protect citizens against tyranny. Brian Gill, *Aiding the Rule of Law Abroad: The Kyrgyz Republic as a Case Study*, FLETCHER F. WORLD AFF., Winter 2005, at 133, 135.

usually, concomitantly diminished.³² Judges in these countries are often treated more as bureaucrats, both by the public and the government, than as members of an equal branch of government.³³ Further, they are often marginalized and demoralized by meager compensation, little respect, and poor job security.³⁴ In some nations, the executive appoints and removes judges, and can do so at will.³⁵ Thus, the transition to a society where judges apply the rule of law impartially, instead of doing the bidding of the executive, brings with it a host of challenges. These significant hurdles are often only exacerbated by the lack of an effective system for administering the judiciary.³⁶

Court administration procedures that are routine in the United States have not been established in many developing democracies. There is often no central docketing system, nor the automation to support it. Practically speaking, these nations usually lack the funds to implement them;³⁷ however, court administrators and judges from the United States are still able to provide helpful training on some day-to-day means of administering cases. Additionally, new approaches to ethical challenges, or even codes of judicial ethics, must be

32. Symposium, *Constitutional "Refolution" in the Ex-Communist World: The Rule of Law*, 12 AM. U. J. INT'L L. & POL'Y 45, 129 (1997) [hereinafter *Refolution*] (statement of Richard Schifter) ("[I]n the Soviet Union, and in the Soviet Bloc generally, judges have, across the decades, essentially been functionaries that would preside over what were reported to be trials, but which really were a matter of essentially rubber-stamping courtroom decisions made by the prosecutors.").

33. *Id.* at 129–30 (explaining that prosecutors in these countries retained the real power while judges were relegated to play the role of "glorified clerk[s]"); *id.* at 132 (statement of Patricia M. Wald) (noting that judges in certain countries often serve at the whim of the administration in power).

34. *Id.* at 132–33 (describing judicial posts in these countries as "low-paying, nonprestigious job[s]" and explaining that such judges were subject to arbitrary actions by the governing administration relating to "appointments, placements, salaries, working conditions, assignments, transfers, [and] removals").

35. See, e.g., *Maldives: Emergency and Tyranny in the Blue Lagoon*, ACHR REV. (Asian Centre for Human Rights, New Delhi, India), Aug. 18, 2004, <http://www.achrweb.org/Review/2004/34-04.htm> (explaining that President Abdul Maumoon Gayoom of Maldives has authority to appoint and remove judges at will).

36. See Am. Bar Ass'n, *ABA Rule of Law Programs Have Global Impact*, ARK. LAW., Oct. 2006, at 14, 15, available at http://www.arkbar.com/publications_LawyerFall2006.htm [hereinafter *ABA Programs*] ("Overwhelming caseloads, coupled with inadequate resource allocation and lack of modern case management mechanisms, often result in procedural delays that undermine the administration of justice.").

37. See, e.g., Ochandarena & Williams, *supra* note 14, at 46. ("Russian courts remain severely handicapped by a lack of resources, particularly in the regions beyond Moscow and St. Petersburg.").

established in order to provide guidelines for the judiciary.³⁸ Because judges in the United States are accustomed to operating in conformity with an established code of ethics, they are able to provide insight into how to both promulgate and implement ethical standards in a country where they do not yet exist.

Judge John R. Tunheim, a federal district judge from the District of Minnesota, has written of his experience with promoting democracy and the rule of law abroad—specifically talking about a trip to Kosovo, a place where I have also participated in judicial training programs.³⁹ He has identified what is generally considered the biggest challenge for developing countries, and the *sine qua non* for a rule of law: judges must be independent.⁴⁰ With independence comes impartiality. An impartial judge is one of the hallmarks of a truly democratic system of government.⁴¹ Open and informal discourse with foreign judges, as colleagues, often leads to candid discussion of the factors that prevent judicial independence, and this dialogue encourages judges to find ways around those impediments. However, my experiences have revealed that the obstacles faced by some foreign judiciaries in their struggle to achieve independence are far-reaching and considerable. Progress will take years of sustained commitment.

For example, when I traveled not long ago to an energy-rich nation that was once part of the Soviet Union, I was introduced to “telephone justice.”⁴² I knew the term. I had read it, among other

38. Cf. John R. Tunheim, *Judges and the Rule of Law in Transitional Nations*, JUDGES' J., Summer 2003, at 17, 17 (recounting personal experience in teaching foreign judges “how to be independent, ethical, and fair”).

39. *Id.* at 18.

40. *Id.* at 19 (“The most important ongoing work, in my view, is the effort to encourage judges to be independent. The lack of judicial independence remains the most significant barrier to effective administration of legal systems.”); accord Brooks, *supra* note 1, at 19 (“[A] democracy without fair and independent courts would necessarily fail and turn to tyranny.”); Ochandarena & Williams, *supra* note 14, at 11 (“An independent and impartial judiciary is a basic and essential component of the rule of law.”); *Refolution*, *supra* note 32, at 132 (statement of Patricia M. Wald) (“[A]n independent judiciary is . . . widely considered a *sine qua non* of a rule of law regime.”).

41. FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 20 (2003) (“The ‘Western model of government’ is best symbolized not by the mass plebiscite [—that is, popular vote—] but [by] the impartial judge.”).

42. Telephone justice refers to a process by which “[g]overnment officials would telephone judges to request particular rulings in cases of interest.” Sandra Day O’Connor, Speech at CEELI Award Ceremony and Luncheon: ABA Annual Meeting, in 42 ST. LOUIS U. L.J. 715, 717–18 (1998); see also Judith Chirlin, *Judicial Independence in the Emerging Democracies of Eastern Europe*, JUDGES' J., Winter 2001, at 34, 34–35.

places, in a country report prepared by the American Bar Association's Central European and Eurasian Legal Initiative ("ABA-CEELI").⁴³ Quite simply, it describes what both the public and legal reformers believe to be the means by which many cases are decided: a powerful politician or oligarch telephones a judge with instructions on how to dispose of a case. Not surprisingly, it is impossible to quantify accurately how often this interference occurs. It has long been my view that public perception of corruption in former Communist countries probably outruns the reality (which is not to say that official corruption is not still a huge problem). My hosts during this visit were a number of high ranking judges, and I had occasion to spend time in their offices and courtrooms. Their hospitality was exceedingly warm, and I hope that I do not seem ungracious when I tell you that I was intrigued by the number of telephones some judges had on their desks. No judge needs three or more telephones in his private office. I am certain that what I came face-to-face with was not simply electronic redundancy but rather the implements of telephone justice.

In addition to the troubling nature of such blatant outside influence on judicial decision-making, the consequences that flow from a lack of judicial independence are also significant. One of the most damaging is public perception of judicial partiality and bias. I learned this first hand during my visits to Bulgaria, which began almost a decade ago. In that country, much of the public views incompetence and corruption as endemic among public officeholders, including judges.⁴⁴ There are times when practices common to the judiciary may inadvertently exacerbate this perception. For instance, it is not uncommon for judges in developing countries to speak to the media, perhaps even commenting on how a prosecutor is handling a particular case. American judges recognize the pitfalls inherent in such actions, including the appearance of partiality and the loss of respect and legitimacy that can follow.⁴⁵ We are, therefore, well

43. After the dissolution of the Soviet Union in 1989, the American Bar Association created ABA-CEELI to provide legal assistance to the emerging nations in Central and Eastern Europe. O'Connor, *supra* note 42, at 715.

44. Cf. Brooks, *supra* note 1, at 21 ("Distrust, disrespect, and disdain for a judicial system inevitably will result in people flouting the law and ignoring court rulings. U.S. Supreme Court Justice Thurgood Marshall warned: 'We must never forget that the only real source of power that we judges can tap is the respect of the people.'" (quoting Editorial, *Justice: Judges Must Strive for Neutrality*, CHI. TRIB., Aug. 15, 1981, § 1, at 7) (reprinting excerpts from a speech delivered by Justice Marshall)).

45. Cf. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5) cmt. (2004).

situated by our experience to point out these pitfalls to judges in emerging democracies. My own experiences abroad have revealed to me both the tragic measure of judicial corruption that exists in many of these countries and the corrosive public distrust so many of their citizens have for officials empowered to dispense justice.

In these nations, establishing codes of judicial ethics is critical. A code of conduct not only serves as a guide to judges, setting forth conduct and types of activity to be avoided, but it also acts to both improve public trust and heighten judicial integrity and independence. In 2000, I participated in a program in Bulgaria, which presented to judges there why United States courts have promulgated written judicial ethics codes, as well as disciplinary systems to oversee and implement those codes. This experience impressed upon me the fact that “[a]ssisting emerging or transitional nations in the development of a code of ethics for judges is extremely important in fostering public confidence in judiciaries, especially those that have been perceived and/or in reality have suffered from corruption and personal favors.”⁴⁶

This recognition of the need for judicial systems everywhere to adopt rules of conduct leads directly to another important element in rule-of-law implementation: judicial transparency. Where the legal process is open and honest, it fosters the trust and confidence of the citizenry that is essential to a robust, functioning democracy. In many of the countries I have visited, judicial selection results from a process that bears no resemblance to either the appointive or elective systems we have in our own country. After being appointed to a state court judicial vacancy, I was required to run for a full term in a popular election. Since then, I have been nominated twice by a U.S. President and confirmed both times by the U.S. Senate. My experience with both state and federal processes involved significant transparency and meaningful participation and input by the organized bar and other citizens’ groups. I have seen nothing comparable in the emerging

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

Id.

46. Louraine C. Arkfeld, *The Rule of Law and an Independent Judiciary*, JUDGES’ J., Fall 2007, at 12, 14.

democracies I have visited. In those countries it is far more likely that a political operative has been awarded a judgeship as mere patronage, or worse.

The deeply troubling nature of a system lacking judicial transparency is apparent in places like Kosovo, where I have visited on three occasions. Until recently declaring its independence, it was an autonomous region within greater Serbia. Nevertheless, historic hatreds between ethnic Albanians in Kosovo and the Slavic people of Serbia run deep.⁴⁷ In the 1990s, Serbian President Milosevic fired most of the Kosovar judges, replacing them with his own hand-picked judges.⁴⁸ After the conflict that led to the NATO bombing of Serbia, and the eventual United Nations governance of Kosovo, many of the dismissed judges were returned to office.⁴⁹ As a result of this history, the competence level of the judiciary—not to mention the morale—suffered greatly. With such a turbulent history and less than a living wage, the judges struggled to function at the most basic level. For instance, during my first visit, the seminar I helped conduct was aimed at teaching judges rudimentary elements of opinion-writing. Kosovo and its judges had no history of written opinions, no repository of opinions, and certainly no online database like Lexis or Westlaw. There was not even a judicial newsletter. Judges had nowhere to go to learn what their colleagues had done or decided. Kosovo, like most other countries I have visited, is a civil code state which does not adhere to *stare decisis*.⁵⁰ Nevertheless, the judges were interested in the effect of published and readily available rulings by colleagues. They saw the value in such a system, if for no other reason than it would allow them to avoid inconsistent applications of their laws.

47. PAUL MOJZES, YUGOSLAVIAN INFERNO: ETHNORELIGIOUS WARFARE IN THE BALKANS 78–80 (1994) (outlining the history of the hatred between Serbs and Albanians and explaining that Milosevic capitalized on that conflict in his rise to power); Erik Drewniak, Comment, *The Bosphorus Case: The Balancing of Property Rights in the European Community and the Public Interest in Ending the War in Bosnia*, 20 FORDHAM INT'L L.J. 1007, 1048–50 & n.319 (1997).

48. See Chirlin, *supra* note 42, at 36 n.2 (reporting that Milosevic fired “about thirty . . . judges who were known to openly support the concept of judicial independence”).

49. *International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping*, SPECIAL REPORT (U.S. Inst. of Peace, Wash., D.C.), Oct. 2003, at 5.

50. *Black's Law Dictionary* defines *stare decisis* as “[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.” BLACK'S LAW DICTIONARY 1443 (8th ed. 2004).

III.

The federal government, often in partnership with other developed countries such as the United Kingdom, is the primary source of funding for programs that promote democracy in developing countries. The federal government funds these programs not only because they promote a sound legal system in developing nations, but also because they promote the political interests of America abroad. It is in the best interest of all nations that developing countries remain stable.⁵¹ Thus, the federal government has assumed a prominent role in promoting the rule of law and democracy. Before explaining how these programs may be in tension with a judge's obligation to abstain from political discussions and foreign policy, it is useful to explore how they work.

USAID is the primary federal agency responsible for funding programs that promote the rule of law and democracy. In addition, the Department of Defense, the Patent and Trademark Office, and the Department of Commerce all fund programs that work with judicial programs overseas.⁵² For example, the Department of Justice, through its Office of Overseas Prosecutorial Development, Assistance and Training ("OPDAT"), often works in conjunction with USAID on the Regional Criminal Justice Initiative, which trains prosecutors and focuses on preventing corruption, human trafficking, and money laundering.⁵³ On a trip to Bosnia as a member of a team that explained our criminal justice system to a group of Bosnian judges, I worked closely with individuals involved in OPDAT. They provided training for Bosnian prosecutors on how to prosecute criminal cases under its newly implemented adversarial system, and for judges who

51. Cf. Martin V. Totaro, *The Other Path of Neoconservatism*, 47 VA. J. INT'L L. 927, 944–45 (2007) (reviewing FRANCIS FUKUYAMA, *AMERICA AT THE CROSSROADS: DEMOCRACY, POWER, AND THE NEOCONSERVATIVE LEGACY* (2006)) ("[T]he United States will not occupy its place as the world's lone superpower in perpetuity. The possible rise of another superpower with less adherence to the principles and practice of the rule of law counsels in favor of a robust present commitment to rule of law promotion.").

52. See Jim Garamone, *Mullen Views Interagency Success in Philippines*, AMERICAN FORCES PRESS SERVICE, June 1, 2008, <http://www.defenselink.mil/news/newsarticle.aspx?id=50069> (Department of Defense); USAID Economic Growth, Partnership for Economic Growth April–June 2008, <http://www.usaid.gov/pk/ecgrowth/index.htm> (Department of Commerce and Patent and Trademark Office).

53. Dep't of Justice, Office of Overseas Prosecutorial Development, Assistance and Training, What is the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT), <http://www.usdoj.gov/criminal/opdat/mission/mission.html> (last visited Oct. 4, 2008).

would oversee that system.⁵⁴ Opening and closing statements, how to deal with evidence, and investigation techniques were all areas where useful information and training were provided. The program gave judges and prosecutors the opportunity to learn both how and why our adversarial system in the United States works effectively. Additionally, members of Croatia's Municipal Court and the Ministry of Justice have participated in programs funded by USAID with American federal and state judges, as well as court administrators, focusing on how to reduce backlog and increase the speed with which cases are processed. Another USAID-funded program allowed Mongolia to overhaul its civil and criminal code, as well as its judicial ethics code.⁵⁵

USAID does not usually implement its own development work. Instead, it contracts with nongovernmental entities which specialize in this type of work.⁵⁶ The process begins with a request for proposal ("RFP"), or an invitation for nongovernmental organizations to bid on work in specific countries.⁵⁷ The request outlines the broad goals that USAID seeks to accomplish in a particular country, as well as general tasks that must be completed. For instance, USAID recently released a draft request for a Judicial Strengthening Initiative in Bulgaria.⁵⁸ The RFP states that its objective is to allow "Bulgarians [to] increasingly trust their judicial system and government" in order to "break the cycles of citizen mistrust of and apathy toward [the judiciary that results from the judicial system's] inability to deliver services in an honest and effective manner."⁵⁹

The request requires that the bidder explain how it will accomplish several major tasks, such as improving the efficiency of the Bulgarian courts, establishing a stronger infrastructure for its Supreme Judicial Council, providing better judicial training, and

54. See Eugene J. Murret, *Strengthening the Courts of Bosnia and Herzegovina*, 91 JUDICATURE 304, 304 (2008) (explaining that the previous inquisitorial-accusatory criminal justice system was replaced with a more adversarial system).

55. *Id.* at 8.

56. USAID Business, *Doing Business with USAID: Acquisition and Assistance*, <http://www.usaid.gov/business/> (last visited Oct. 4, 2008) (noting that USAID awards approximately \$4 billion annually in federal contracts and grants).

57. USAID Indonesia, *Doing Business with USAID: How Can I Become an Implementing Partner with USAID?*, <http://indonesia.usaid.gov/en/Page.DoingBusiness.aspx> (last visited Oct. 4, 2008).

58. FBODaily.com Solicitation Notice, *Judicial Strengthening Initiative (JSI) in Bulgaria* (Mar. 31, 2004), <http://www.fbodaily.com/archive/2004/03-March/31-Mar-2004/FBO-00555700.htm>.

59. USAID/BULGARIA, *GRADUATION STRATEGY 2003-2007*, at 49 (2003), http://bulgaria.usaid.gov/cdir/bulgaria.usaid.gov/files/Grad_Strategy_public.pdf (capitalization modified).

facilitating increased enforcement of its laws.⁶⁰ The contracting entity must then determine how to effectuate the outlined objectives. In my experience, the contractor has decided to accomplish the goals, in part, by implementing various training sessions that include seminars featuring American judges who speak on topics of particular interest to the subject country. In these instances, the contractor's in-country staff selects judges it thinks have expertise in a particular area, and then invites them to participate. Judges are not compensated for their work,⁶¹ though their traveling expenses are reimbursed.

The National Center for State Courts⁶² involvement with rule-of-law promotion mostly stems from its contracts with USAID. The Center sends state and federal judges overseas for short-term training sessions with judges in developing nations such as Croatia, Hungary, Kosovo, Mozambique, Nepal, and Nigeria.⁶³ Additionally, more than three hundred court personnel from various countries visit the National Center for State Courts in Virginia for training every year.⁶⁴ The Center works closely with the Administrative Office for the United States Courts to pair federal judges who have experience in a particular area with corresponding programs abroad.

The American Bar Association ("ABA") also does substantial development work promoting the rule of law.⁶⁵ Its Rule of Law Initiative is organized into several councils, which provide skilled and tailored public service to over forty developing countries throughout the world.⁶⁶ In their efforts to support the rule of law, these councils

60. See USAID Indonesia, *supra* note 57 (explaining that an acceptable proposal must "[i]nclude sufficient detail to permit a determination that USAID support" is merited).

61. Ochandarena & Williams, *supra* note 14, at 12 ("Federal judges offer the highest expertise at the right cost—none.").

62. The Center was created in response to Chief Justice Warren Burger's call for a central resource for state courts at the First National Conference of the Judiciary in 1971. Its mission is to improve court administration through leadership and service. National Center for State Courts, History, http://www.ncsconline.org/D_About/Background.html (last visited Oct. 3, 2008).

63. Heike P. Gramckow, *Judges and Courts Abroad: Different Systems, Similar Problems*, JUDGES' J., Summer 2003, at 7, 7; National Center for State Courts, Our Projects, http://www.ncscinternational.org/x/Projects_by_Geographic_Regions.aspx (last visited Oct. 3, 2008).

64. Gramckow, *supra* note 63, at 7; National Center for State Courts, *supra* note 62 (indicating that the National Center for State Courts has been headquartered in Williamsburg, Virginia since 1978).

65. Since 1990, over 5000 American judges, lawyers, and law professors have participated in the ABA's efforts to promote democracy by advancing the rule of law and donating more than \$200 million in pro bono legal assistance to developing countries. *ABA Programs, supra* note 36, at 14.

66. *Id.*

recruit American attorneys, with at least five years of experience, who are willing to volunteer in these countries to either train or to support local lawyers.⁶⁷ The ABA also teams up with other nongovernmental organizations to provide judicial training seminars to judges in developing countries.⁶⁸

Similarly, the National Judicial College⁶⁹ brings together foreign and American judges to discuss common problems, and to promote the effective administration of justice. Along with the Department of the Interior and the Ninth Circuit, the National Judicial College recently sponsored a program in the Federated States of Micronesia.⁷⁰ Judges from Native American Tribal Courts, federal, and state courts participated in the conference with judges from the Federated States of Micronesia. That conference offered a comprehensive presentation regarding how American courts deal with cultural customs as they impact witnesses and evidentiary issues, and it provided insight into how the judicial system in Micronesia can do the same.

It is important to note that not all programs that utilize federal judges are sponsored by the federal government. The International Judicial Academy,⁷¹ a not-for-profit organization located in Washington, D.C., provides week-long seminars for judges from developing countries. During these seminars, judges from other countries learn about the American judicial system. Federal judges at both the trial and appellate level explain the system and address how questions of law, particularly pertinent to the foreign judge's country, are dealt with in the United States. The International Judicial Academy is

67. ABA Rule of Law Initiative, Opportunities with the Rule of Law Initiative, <http://www.abanet.org/rol/opportunities/opportunities-home.shtml> (last visited Oct. 3, 2008).

68. *ABA Programs*, *supra* note 36, at 14, 15–16; ABA Rule of Law Initiative, Judicial Reform, http://www.abanet.org/rol/programs/resource_judicial_reform.html (last visited Oct. 3, 2008) (indicating that the ABA's Rule of Law Initiative works in coordination with "judicial training centers" to help educate and train judges in Eastern Europe, Africa, the Middle East, and Asia).

69. Located in Reno, Nevada, the National Judicial College is a training institution for members of the judiciary. Courses in judicial education are held onsite, throughout the country, and around the world. Nat'l Judicial Coll., The NJC Experience, <http://www.judges.org/about.html> (last visited Oct. 3, 2008).

70. William J. Brunson, *Pacific Islands Program*, CASE IN POINT, Summer–Fall 2006, at 23, 23 (explaining that the educational efforts of the National Judicial College are funded by the Department of Interior and the Ninth Circuit Court of Appeals).

71. The International Judicial Academy is a nonprofit educational institution founded in 1999 to provide quality educational programming for judges and legal professionals throughout the world. It seeks to promote in all nations a "modern, fair, efficient, accessible and transparent court system." Int'l Judicial Acad., The Academy—A Description, <http://www.ijaworld.org/AboutUs.html> (last visited Oct. 3, 2008).

different from other organizations in that it brings foreign judges to the United States for training rather than sending American judges abroad.⁷² The National Committee on United States-China Relations⁷³ has also asked judges from the federal and state courts to participate as presenters in workshops and seminars in China, and as hosts in the United States for visiting Chinese judicial delegations.

Religious organizations also work to promote the rule of law and democracy, in part by utilizing the unique expertise of federal judges. For example, Advocates International,⁷⁴ a Christian organization, co-sponsored a three-day seminar on judicial ethics in Albania, in cooperation with the Albanian Supreme Court and the ABA.⁷⁵ This organization works in conjunction with judges and other legal professionals to promote the rule of law in order to further its mission of securing religious freedom, human rights, and professional ethics for people in developing nations across the globe.⁷⁶

It is significant that the federal judiciary has independently determined rule-of-law promotion to be of such importance that it formed the Judicial Conference Committee on International Judicial Relations.⁷⁷ The jurisdiction of this Committee is to

coordinate the federal judiciary's relationship with foreign judiciaries and with official and unofficial agencies and organizations interested in international judicial relations, and the establishment and expansion of the rule of law and the administration of justice, and to

72. Like the International Judicial Academy, the National Center for State Courts also hosts foreign judges (in addition to sending American judges abroad). Gramckow, *supra* note 63, at 7.

73. Founded in 1966, the National Committee on United States-China Relations was created to help facilitate learning and education between the two nations. In keeping with its core educational mission, the Committee's programming is targeted at both government officials and the general public in both countries. Nat'l Comm. on U.S.-China Relations, *Our History*, <http://www.ncuscr.org/who-we-are/our-history> (last visited Oct. 3, 2008).

74. Advocates Int'l, Home Page, <http://www.advocatesinternational.org/> (last visited Oct. 4, 2008).

75. Advocates Int'l, 2002 Global Highlights, <http://www.advocatesinternational.org/pages/global/resources/Newsltrs/news02/newsOct02.php> (last visited Oct. 4, 2008).

76. Advocates Int'l, Advocates International's Global Network: A Miracle in Slow Motion, <http://www.advocatesinternational.org/pages/global/about/miracle.php> (last visited Oct. 4, 2008).

77. The Committee was established in 1993 to respond to the growing number of requests for judicial assistance in newly emerging democracies and developing countries. Fed. Judicial Ctr., Assistance to Other Nations to Improve the Administration of Justice, [http://www.fjc.gov/public/pdf.nsf/lookup/FJCAssistOtherNations.pdf/\\$file/FJCAssistOtherNations.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/FJCAssistOtherNations.pdf/$file/FJCAssistOtherNations.pdf) (last visited Oct. 3, 2008).

make recommendations as appropriate to the Chief Justice, Judicial Conference of the United States, and other judicial entities.⁷⁸

One of the Committee's efforts is coordinating participation of federal judges and their courts with the Open World Program, which is operated by the Center for Russian Leadership Development at the Library of Congress.⁷⁹ American judges host Russian judges in their courts for one-week stays. Since the inception of the Open World Program, more than 250 Russian judges have traveled to Washington, D.C., for a two-day general overview of the American judiciary, and then for eight days of meetings with local judges.⁸⁰ The program is designed to introduce the Russian judicial participants to the full range of American legal experience. I have had the privilege of working with this program on several occasions, and the Library of Congress deserves praise for its successful administration of the program.

IV.

While promoting a stable judiciary abroad is unquestionably a laudable goal, the involvement of federal judges creates a unique set of problems. The judiciary is a branch of government, separate from the executive and the legislative branches.⁸¹ The participation of judges in nation-building, or more controversial efforts to establish democracy, has the potential for raising separation-of-powers issues. There are also valid concerns regarding judicial ethical obligations and government funding of rule-of-law programs.

The separation-of-powers doctrine underlying our Constitution is attributable, in part, to the influence of James Madison.⁸² During the drafting, Madison proposed that power in government must be shared by separate, but coordinate, branches.⁸³ He believed that while

78. U.S. Courts, Jurisdictional Statements, http://www.uscourts.gov/judconf_jurisdictions.htm (last visited Oct. 3, 2008).

79. Open World Leadership Ctr., Open World Program Brings 33 Russian Judges to Six States: Visit Coincides with Russia's Implementation of New Judicial Reforms, Mar. 5, 2002, <http://www.openworld.gov/press/print.php?id=13&lang=1>.

80. U.S. Courts, Promoting a Strong Judicial Branch Across the Globe, <http://www.uscourts.gov/newsroom/ruleoflaw.html> (last visited Oct. 4, 2008).

81. See U.S. CONST. arts. I–III.

82. See *generally* THE FEDERALIST NOS. 47–51 (James Madison).

83. See RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 196, 204 (Univ. Press of Va. 1990) (1971) (explaining that Madison's "Virginia Plan" provided for a "tripartite frame embodying

power needed to be equally dispersed, and not centralized, the branches needed to be blended to the extent necessary for each branch to ensure that the others did not overstep their constitutional bounds.⁸⁴ Our system of “checks and balances,” giving each branch of government limited authority over the other two, is derived from this principle. The involvement of the American judiciary in rule-of-law programs abroad raises separation-of-powers concerns insofar as those programs touch upon matters of foreign policy, a province exclusively committed by the Constitution to the political branches of government.⁸⁵

For instance, a group of four federal judges, five prosecutors, three defense attorneys and a court administrator recently traveled to Iraq to make recommendations on how to improve the country’s justice system.⁸⁶ Few issues provoke more political wrangling these days than the question of what our role should be in Iraq. The judges on that trip, I am sure, did not go with the intent to impose or endorse any particular party’s view of how Iraq should be rebuilt. However, the question of how active a role the United States should play in determining the structure of government in Iraq is not only inherently political, it is also hotly debated. Aiding Iraqi judges in determining how to solve the problems they face, such as how to implement a

checks and balances”). The end result was three distinct branches of government, the legislative, executive, and judicial, codified in Articles I, II, and III of the Constitution, respectively. U.S. CONST. arts. I–III.

84. THE FEDERALIST NO. 48, at 276 (James Madison) (Clinton Rossiter ed., 1961). The value of a connected system of three separate branches of government was echoed by other Founding Fathers. In 1775, John Adams wrote, “[B]y balancing each of these powers against the other two . . . the efforts in human nature towards tyranny can alone be checked and restrained” Letter from John Adams to Richard Henry Lee (Nov. 15, 1775), *in* 4 WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 185, 186 (Little, Brown, & Co. 1865), *quoted in* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 146 (2d ed., Liberty Fund 1998) (1967).

85. In 1948, the Supreme Court explained:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

86. See Press Release, Dep’t of Justice, Department of Justice Sends 25 Advisors to Iraq in Support of Provisional Authority Effort to Reconstruct Criminal System (May 20, 2003), http://www.usdoj.gov/opa/pr/2003/May/03_ag_267.htm.

judicial code after their only experience has been under a totalitarian regime, is certainly useful. But addressing infrastructure problems, such as who will pay the judges' salaries, is the responsibility of the executive branch.

By way of background, let me explain that the Canons of the Code of Conduct for United States Judges,⁸⁷ under which all federal judges operate, lay out parameters regarding the types of extra-judicial activities in which a federal judge may engage. Canon 4 allows a judge to "speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice,"⁸⁸ as I am doing now, so long as a judge "does not cast reasonable doubt on the [judge's] capacity to decide impartially any issue that may come before the judge."⁸⁹ Canon 5 allows a judge to "represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities."⁹⁰ This seems reasonably straightforward. As with most human experience, however, things are not always that simple.

For example, Canon 7 forbids a judge from engaging in political activity or making speeches for a political organization.⁹¹ While Canon 7 continues to allow a judge to speak on educational topics,⁹² the line between education and politics, especially when promoting democracy, could become blurred if an Article III judge is not aware of the tensions I have noted and is not vigilant about avoiding policy pronouncements. It is unlikely that any controversy pending in a municipal court in Pristina, Kosovo will come before me. So, discussing the efficient administration of the Court there is unlikely to raise an ethical issue. However, cultural issues are often at the heart of what troubles the judicial system of developing countries, whether born out of years of communist rule, ethnic tensions, or the simple lack of economic support. Addressing these questions as a matter of American foreign policy is inherently the prerogative of the executive branch—one in which an Article III judge has no legitimate role.

The involvement of federal judges in rule-of-law promotion efforts abroad must comport with the U.S. Constitution and respect fundamental separation-of-powers principles. In our efforts to

87. CODE OF CONDUCT FOR U.S. JUDGES (Judicial Conference 1993).

88. *Id.* Canon 4A.

89. *Id.* Canon 4.

90. *Id.* Canon 5G.

91. *Id.* Canon 7.

92. *Id.*

educate and lead by example, the federal judiciary must carry out these initiatives in a manner consistent with American foreign policy, as determined by the executive. An active political role by a member of the federal judiciary abroad would not only violate judicial ethics, it would undermine U.S. foreign policy, flying in the face of the well-established principle that the nation speak with one voice when it comes to such matters.⁹³ Thus, it is our role to act as consultants. We explain what happens in the American system, why we think it works, but also what the inherent problems with our system are. It is not our place to tell judges from another country why they should implement a particular program, or to purport to convey the American government's view of their system.

Complicating matters further is that the executive branch, through USAID, funds many of the programs engaged in by federal judges. The topics and issues discussed by the judges are often predetermined by the executive through the request for proposals. In essence, the American executive is asking federal judges to participate in seminars in developing countries to tell the foreign judges how they can become independent. While this does not actually compromise the independence of the American judiciary, it may cloud the foreign judiciary's perception of American judicial independence. As such, it remains an interesting tension that all judges participating in these programs ought to be aware of, and a tension that they must delicately assuage.

In the end, any potential problems must be overcome by the manner in which the judges address their opportunities to speak and work abroad. First, we are there by invitation, not compulsion. Article III judges make themselves available to share their expertise in the American system. For example, when I first participated in a rule-of-law program in Russia, I explained our process of conducting criminal trials and other issues of criminal procedure. Nothing in my presentation, however, implicated the political question of whether Russia should follow our lead. Because the role of a federal judge abroad is inherently descriptive, any potential ethical conflict may be avoided.

There is another incidental effect of sending federal judges into foreign countries. This one, I believe, is inherently more positive. By

93. *See* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.").

sending American judges to other countries, those judges necessarily come to know about other legal systems. Whether one agrees that international law should have some influence on American jurisprudence,⁹⁴ the reality is that it has been given a role to play.⁹⁵ In 1999, Supreme Court Justice Clarence Thomas, in a denial of certiorari for *Knight v. Florida*, spurned the idea that the Court should look to the precedent of the European Court of Human Rights, or court decisions rendered in other countries as support for our own Supreme Court's jurisprudence.⁹⁶ He noted that the particular death penalty prisoner he was addressing had no viable claim under Supreme Court precedent, and that "[i]ndeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council."⁹⁷ Apparently, however, looking to international bodies for support was not as far-fetched as Justice Thomas suggested.

In 2002, the Court held, in *Atkins v. Virginia*, that the death penalty is not an appropriate punishment for a mentally retarded defendant.⁹⁸ In a footnote, in the midst of the discussion of how the death penalty is viewed in the fifty states, Justice Stevens, the author of the majority opinion, mused that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."⁹⁹ Even this brief mention of international standards set off a spirited debate. And it foreshadowed things to come.

More recently, in *Lawrence v. Texas*,¹⁰⁰ Justice Kennedy explicitly looked to international law for guidance. He criticized Chief Justice

94. Although an analytical difference exists between a court looking at international law as a tool to interpret American law and a court interpreting an international treaty or convention when applying it to an American case, both are implicated by an increasing exposure to foreign court systems.

95. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575–76 (2005) (acknowledging the Court's previous recognition of the international community's view on whether a criminal punishment is cruel or unusual); *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (noting international cases decriminalizing homosexual conduct); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (describing the overwhelming international disapproval of the execution of mentally retarded criminal defendants).

96. *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of cert.).

97. *Id.*

98. *Atkins*, 536 U.S. at 321.

99. *Id.* at 317 n.21.

100. 539 U.S. 558 (2003).

Burger's earlier references, in *Bowers v. Hardwick*,¹⁰¹ to the history of Western civilization, as a basis for that decision. Justice Kennedy pointed to more recent international law that urged a conclusion opposite to the one reached by Chief Justice Burger. Kennedy pointed to an advisory committee of the British Parliament that had recommended the repeal of laws punishing homosexual conduct, which was later adopted by Parliament.¹⁰² Justice Kennedy then looked to the European Court of Human Rights, and found that, in a situation similar to those at issue in *Bowers* and *Lawrence*, the laws forbidding homosexual conduct were held invalid under the European Convention on Human Rights.¹⁰³ The notion that the history of Western civilization demands the outcome in *Bowers*, Kennedy reasoned, was at odds with the actual determinations of Western European courts.¹⁰⁴ My point in reciting these cases is not to re-argue their merits. Instead, it is simply to point out that the laws of other countries have found their way into the reasoning employed by some Supreme Court Justices.

The influence of foreign law is sometimes apparent in lower courts. For example, lower courts must consider whether the Vienna Convention on Consular Relations has been violated where a foreign national's consulate was not informed of his incarceration.¹⁰⁵ International custody disputes under the Hague Convention on the Civil Aspects of International Child Abduction, as adopted by the International Child Abduction Remedies Act,¹⁰⁶ often play out in federal courts.¹⁰⁷ Similarly, federal district and appellate courts are routinely asked to interpret contracts that are increasingly being written in foreign countries, with provisions for arbitration in foreign nations.¹⁰⁸ In fact, the Second Circuit was recently asked to enforce an

101. *Bowers v. Hardwick*, 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring).

102. *Lawrence*, 539 U.S. at 572–73 (citing COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, REPORT, Cmnd. 247, at 115 (1957) (Wolfenden Report); Sexual Offences Act, 1967, c. 60, § 1 (Eng.)).

103. *Id.* at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. ¶¶ 61, 63 (1981)).

104. *Id.*

105. *See, e.g.*, *Breard v. Greene*, 523 U.S. 371, 373 (1998).

106. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–610 (2000).

107. *See, e.g.*, *Duarte v. Bardales*, 526 F.3d 563, 565 (9th Cir. 2008); *Baran v. Beaty*, 526 F.3d 1340, 1341–42 (11th Cir. 2008); *Kufner v. Kufner*, 519 F.3d 33, 35 (1st Cir. 2008).

108. *See, e.g.*, *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 41, 48 (1st Cir. 2008) (compelling arbitration in China under the contract's arbitration clause); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 281–82 (5th Cir. 2004) (enforcing an arbitration award entered in Geneva, Switzerland, arising from a contract negotiated and breached in Indonesia).

arbitration award against the Russian government.¹⁰⁹ With ever-increasing economic and cultural interactions, the call to apply international law or the law of another country will likely take on heightened relevance in the future.

CONCLUSION

When judges learn more about foreign court systems, it fosters a global awareness of the differences between those legal systems and our own. Coming into contact with foreign colleagues can also make judges in the United States better appreciate their own system, while the experience acts as an important reminder that our way is not the only way that a functioning judiciary can operate. As Mark Twain wrote in *The Innocents Abroad*: "Travel is fatal to prejudice, bigotry, and narrow-mindedness, and many of our people need it sorely on these accounts. Broad, wholesome, charitable views of men and things cannot be acquired by vegetating in one little corner of the earth all one's lifetime."¹¹⁰

While broadening our horizons, it is important to not lose sight of all that we enjoy in this country. We need to take stock more often of the great reservoir of civic virtue that is the wellspring of genuine public service in America. Basic honesty. Faithfulness to the law. Respect for legal authority. Commitment to social justice. These are not accidents. They are the natural offshoots of the culture from which we spring. Our efforts abroad, including the adoption of codes of judicial ethics, continuing education for judges, and notions of judicial independence and administrative transparency, are all apiece with the cause for justice. In promoting the rule of law in nations trying to overcome generations of injustice, we are facilitating the establishment of a judicial system that is stable, predictable, and just. We are, in essence, teaching those around the world by our example that to administer *equal* justice is to deliver the only real justice that there is.

109. *Compagnie Noga D'Importation et D'Exportation, S.A. v. Russian Fed'n*, 361 F.3d 676, 677 (2d Cir. 2004).

110. MARK TWAIN, *THE INNOCENTS ABROAD* 489 (Signet Classic 1966) (1869).