International Lawyer

Volume 41 | Number 4 Article 4

2007

After Dinner Remarks

Stephen G. Breyer

After Dinner Remarks

JUSTICE STEPHEN G. BREYER

For several days this month (February 2007), we judges (eight Justices and two Advocate Generals of the European Court of Justice and seven Justices of the Supreme Court of the United States) have met together and discussed a host of relevant topics. We are grateful to the members of the faculty at the SMU Dedman School of Law and the Yale Law School, who have helped to organize these productive discussions. The last few days have brought to my own mind three images.

The first is a recollection dating from the time of 9/11. On that day, Justice O'Connor and I were in India. She was on the airplane at the time of the attack. Joanna and I had arrived the day before. We were going to see Indian judges. After the attack, the American Ambassador tried to send us home. But I thought that neither Sandra nor I would agree to go home without trying to do what we came to do. Of course, I was right.

What struck me particularly about that visit was not simply the tremendous wave of support that came from Indian judges and lawyers. I suddenly began to see that the true division of importance in the world is not between different countries or different continents. The difference of importance is between those who are committed to reason—to working things out, to understanding other people, to the peaceful resolution of differences—and those who are not. People committed to reason are committed to what we call civilization or the rule of law. Unfortunately, not everyone is committed to these noble goals. Formidable forces of unreason actively work against these values. The lawyers and the judges are on the right side of the divide. They are on the right side in India. They are on the right side in the United States of America. They are on the right side of this conflict in every country in the world.

The second image is an image of groups of professionals from different nations together weaving a fabric—a legal fabric that helps to increase the power of those who believe and reason and that helps to shield us against unreason's force. In helping to weave this fabric, we lawyers and judges act not as politicians or even statesmen. Rather, we act as professionals. We do our professional jobs irrespective of politics.

Of course, the notion of weaving a fabric is a classical image. It reminds me of my efforts to read Virgil's *Aeneid* in Mr. McCarthy's high school Latin class. My fallible memory tells me that Aeneas emerged from the turbulent seas, shipwrecked on the Libyan coast, to find men and women at work building a city, rather like a colony of bees. Some few weeks after 9-11 I began to understand the power of Virgil's image. Joanna and I had the opportunity to visit the devastated site. Looking down upon it from a neighbor-

ing building, we saw construction workers, sanitation workers, and health workers busy clearing and repairing. We saw before us an example of a basic reasonable human instinct, the instinct constructively to build and to repair. That, too, underlies our joint professional efforts to knit or to weave a legal fabric that will work well for the people whom our laws affect.

Certainly, there are many important differences among the laws of our different nations. But there are more important similarities. Nations throughout the world to an ever greater extent support judicial independence. They do so in part because they believe such judiciaries can help in turn to support what I have called the forces of reason.

At the time our Constitution was written, Alexander Hamilton argued that an independent judiciary was necessary to enforce our Constitution's provisions. Without that independence, the Constitution would bend like a reed before the prevailing political winds. Americans would resolve their problems with bayonets, not law.[1] That was 200 years ago; and it has taken us almost as long to understand the importance of that independence. Consider the following cases:

In the 1830s the Supreme Court decided *Worcester v. Georgia*.[2] Georgia had found gold on the Cherokee Indian land; Georgia had taken the land; and the Indians had sued. The Cherokees won, but they did not get their land back. Instead, President Andrew Jackson supposedly said, "John Marshall made his decision; now let him enforce it."[3] And the President sent troops to Georgia to evict the Indians. The Cherokees walked the "Trail of Tears" to Oklahoma where the descendants of those who survived live to this day.

In the 1960s, the Court decided *Cooper v. Aaron*.[4] Orville Faubus, the Governor of Arkansas stood in a Little Rock schoolhouse door and said (despite *Brown v. Board of Education* declaring racial segregation unconstitutional) that his state militia would prevent black children from entering the all white Central High School. President Dwight Eisenhower then sent paratroopers instructed to enforce a court integration order. The paratroopers acted to enforce the law. I can remember those very brave black children, taken by the paratroopers' hands, walking into that school. That public decision to support the law made the day a great day for judicial independence, for law, and for the United States of America. In *Cooper v. Aaron*, all nine Justices of the Supreme Court of the United States signed an opinion insisting that the school desegregate. But not nine, not 900, not 9,000 justices could have brought about compliance had the President of the United States not ordered the paratroopers to enforce the law. (I add that the wife of Chief Ross, the Cherokee's Chief at the time of *Worcester*, died on her trip to Oklahoma and is buried close to Little Rock's Central High School.)

Our Court continues to make decisions, for example, in areas of school prayer, abortion, even *Bush v. Gore*.[5] Many think they are wrongly decided. (Indeed, I was in the dissent in *Bush v. Gore*.) Many of these decisions are unpopular. Emotions may run high. Yet, today there is no need for paratroopers; there are no rocks, no stones thrown in the streets. The public generally accepts the Court's decisions as law even when they disagree

1. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).
2. 31 U.S. 515 (1832).
3. *See* RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS 118-19 (1987).
4. 358 U.S. 1 (1958).
5. 531 U.S. 98 (2000).

with the Court and feel strongly about it. And when I refer to the public, I do not mean a few thousand judges or even a million lawyers. I mean 300 million Americans. It took a Civil War, eighty years of legal segregation, and many ups and downs to bring Americans to the point where an ingrained habit—acceptance of the law as courts determine it—avoids the need for paratroopers while assuring respect for the law.

I refer specifically to our own "rule of law" history because it reflects the difficulties we all face when trying to establish the rule of law throughout the world. Yet "globalization," while a cliché, is also a reality. And that reality makes the effort to establish and to maintain a rule of law a pressing task.

We benefit from mutual discussion as we share that task in part because we judges are ever more likely to have to take account of the laws of other nations. I looked specifically at our docket of a few years ago. And I found that more than half a dozen cases, out of about seventy cases, involved foreign laws. In one case, an antitrust case, we had to decide whether an Ecuadorian plaintiff could sue a Dutch defendant in the United States about a cartel which had one American member and many more members who were not Americans.[6] To answer that question properly, we had to know something about the antitrust law of the European Union. In another case, the plaintiff, Mrs. Altman, brought suit in Los Angeles to obtain six Klimt paintings that the Nazis had taken from her uncle and given to the Austrian national museum. The question before us was whether the museum could assert a defense of sovereign immunity. To answer the question we had to understand how the concept —sovereign immunity — is used throughout the world. (I found helpful a French Court of Appeals decision in which the court held that, despite an assertion of sovereign immunity, ex-King Farouk had to pay Christian Dior for his wife's dresses; the French court pointed out that he was no longer King).[7] We found knowledge of foreign law useful or necessary in cases involving document discovery (claimed useful for a presentation to the European cartel authority), the North American Free Trade Agreement (NAFTA),[8] and a tort case based on an old federal statute that provided damages for those harmed by pirates (who are today's pirates?). Germany, Japan, the European Union, filed briefs in some of these cases. Indeed, we are dependent upon good briefing to find good answers; the lawyers who write those briefs will have to learn ever more about how to find answers to foreign law questions. And that means, we will need cooperation among all three parts of our profession, academia, bench, and bar, to perform an effective judicial task in this increasingly globalized world.

In part, globalization calls to our attention a similarity of attitude among those whom the law effects. This fact was brought home to me when I participated in discussions celebrating the 100th anniversary of the French Civil Code. After a day and a half of formal presentations the conference organizers opened the floor for questions. There were three questions. The first questioner asked, "Since we have modified the Civil Code to recognize the equal rights of women, why have I not seen any women on the program?" The second asked, "How should we modify the law to reflect the fact that we are part of Europe, develop a new French Code, a new European Code, some kind of mixture?" The third, referring to the values of democracy, equality, and individual rights that underlie the

6. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

7. Ex-King Farouk of Egypt v. Christian Dior, 84 Clunet 717, 24 I.L.R. 228 (CA Paris 1957).

8. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752 (2004).

Code, asked, "How do we pass those values on to the next generation?" In my own mind, I asked a geographical question. Could I not have heard somewhat similar questions raised in San Francisco, Boston, Des Moines, or Chicago?

My final image is personal. Some years ago I worked for Senator Kennedy when he was Chairman of the Senate Judiciary Committee. (I was Chief Counsel).[9] At a later reunion, I heard Senator Kennedy tell his 300 or more former staff members that his father had taught him that a worthwhile goal in life was to gather together men and women of different abilities, with different talents, from different professions, who do not necessarily all think alike—and help. Help who? Help others; help a cause; help each other accomplish something as well. When I consider the conversations of the past few days, I believe I have seen an example of professional people trying to help, to help each other achieve public goals. We did not order, or decide, or negotiate. We participated in a conversation. We listened. As Michael Oakeshott pointed out years ago, a conversation is not a contest or a debate that can be won or lost. Its value lies in a residue left in the mind; a residue that may prove useful some time in the future. Given a world where more and more people face ever more similar problems, where they look to law for answers, where they place hope and trust in judicial institutions, where judges, like others, are rarely certain about how to find legal answers to many common problems, but where judges, lawyers, and ordinary citizens know they are on the side of that reason that is the law, this kind of conversation may prove one of the best ways for each of us to help each other as we set about our common task.

This is why I am grateful for the opportunity to have participated in the discussions of the past few days. Thank you.

9. United States Senate Committee on the Judiciary, http://judiciary.senate.gov/ (last visited Nov. 2, 2007).