THREE SALIENT FEATURES OF THE UNITED STATES LEGAL SYSTEM

One American Academic's View

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Like any one individual's view into any legal order, my perspective on the American system in which I was formed, trained, practiced, and now teach is strongly affected by my own background. As a public international lawyer starting his career in the U.S. Department of State (foreign ministry), I tend to look at my own system from the top down (a "bird's eye view") as opposed to from the bottom up (a "worm's eye view"). Subsequently as a public interest lawyer, I learned to look for entry points into the U.S. public law system from the point of view of a member of the public, as opposed to a governmental insider. Both in those roles and as an academic, I have been particularly concerned about both the procedural and substantive integrity of decisions taken by public authorities, whether those actions have implications domestically, internationally, or both. From that perspective, I offer the following entirely personal thoughts on three compelling features of the U.S. legal system.

I. FEDERALISM

My class in International Law recently had the occasion to read the Treaty of Paris concluded in 1783 with Great Britain, the peace treaty which ended the American Revolutionary War. In the first article of the agreement, Great Britain acknowledges the "United States, viz. New Hampshire, Massachusets Bay [and 11 other colonies] to be Free, Sovereign, and Independent States." The choice of the plural "State*s*," which is consistent with the usage in the remainder of the provision, is telling: The former colonial power acknowledged the freedom, sovereignty, and independence of the colonies individually as separate units, and not necessarily as a collective or as a unitary state.

It was for the former colonies *themselves* to join with each other as the country now known as the United States, first under the Articles of Confederation (adopted 1777) and then under the Constitution (adopted 1787). In American political and legal culture, this is more than just an historical artifact, but a living reality. Indeed, we fought a war over its meaning less than a century after independence, and every schoolchild is instructed in its present-day incarnation. The division of our governmental structure into a two-tiered structure is so all-pervasive that even we as citizens of the United States frequently lose perspective on its meaning.

In principle, the federal government is an entity of both limited and enumerated powers as defined in the Constitution. In theory, all residual power is

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retained by the states, which means that most local concerns such as land use and the bulk of criminal law are subjects of state law, administered by each state's own court system. To that extent, the constituent states such as my own state of Massachusetts continue to be sovereign in the non-technical sense that they have de facto control over many day-to-day activities occurring within their territories. The notion that citizens of the United States can participate in local and state-level self-governance more or less independently of what is going on in the rest of the country is a cherished value, and one that appears regularly in political and legal discourse. Americans will quite typically observe that their federal structure is an important failsafe by which they retain some measure of decentralized political and legal autonomy as a counterweight to potential overreaching by the federal government.

The integrity of our federal structure is an article of faith in American politics and law. The Supreme Court routinely speaks of "our federalism" and the utility of the states as laboratories for policy and legal experimentation. But by comparison with other federal states -- and notably other English-speaking countries to emerge from same common law legal tradition, such as Canada and Australia -- the constituent states of the United States have relatively little power. The history of American politics and U.S. constitutional law, particularly in the 20th century, has been by and large a story of the expansion of federal authority vis-à-vis the states. One catalyst has been the rise of social welfare legislation in such areas as consumer protection, labor, and environment, which appears to be both more effective and more efficient when applied uniformly at the federal level. Another has been pressures from abroad in such areas as trade and national security, as demonstrated perhaps most recently by the political and legal responses to the tragedy of 9/11.

Nonetheless, the states continue to be effective crucibles for policy reform at the sub-national level, which in turn can be a very effective catalyst for national programs. Economically powerful sub-national units like California, with a total GDP greater than that of Canada, Spain, or South Korea, are in a position to adopt standards that de facto have national effect. In the absence of coherent federal policy on such emerging issues as global warming, the states have stepped forward to fill the gap and take the lead. Those actions at the state level as part of our federal structure are, however, not entirely free from legal controversy. "Our federalism" continues to evolve as the United States continues to explore what it means to be a federal state in a 21st century globalized economy.

II. SEPARATION OF POWERS

America's political culture and legal structure, both historically as well as in the present, has been concerned with the protection of the individual from governmental tyranny. This skepticism concerning the potential arbitrary exercise of governmental authority is a principal theme in the Declaration of Independence (1776), as well as in our decentralized federal structure. At the federal level, one can identify the same themes in the explicit enumeration of rights in the initial amendments to the Constitution (Bill of Rights), as well as in the division of the federal government into three discrete branches: legislative, executive, and judicial. As every American schoolchild is taught, this separation of powers is designed to

create a system of "checks and balances," in which governmental power is distributed among co-equal branches of government in a manner designed to assure that no one of the branches can exercise a monopoly of governmental power. In this respect, the framers of the Constitution explicitly rejected the precedent of the British parliamentary system, in which the executive is drawn from the ranks of the legislature.

The federal separation of powers is intended to facilitate the transparency and integrity of governmental decision-making by compartmentalizing functions within distinct branches. That is, the Congress has the exclusive prerogative to adopt generic, prospective legislation, but lacks the authority to execute the laws it enacts. So, for instance, the Congress may enact federal criminal legislation, but may not initiate prosecutions under those laws. Similarly, the Executive Branch, headed by the President, is charged with carrying out the laws, as in prosecuting individual violations of the laws Congress enacts. Consistent with the theory, however, the Executive Branch does not create the law, but, rather, is confined to implementing or executing legislation. The Constitution confines the federal courts to adjudicating disputes, as opposed to making legislation (the function of the Congress) or carrying out the law (the function of the Executive).

With the growth in concern during the 20th century over social welfare issues -- such as minimum wages, hours and working conditions for laborers, regulation of food and drugs, assurances for investors in publicly-traded securities, consumer protection, and the environment -- there was a commensurate increase in demand for governmental activity, frequently in a regulatory mode. Many of these areas demand technical expertise beyond the institutional capabilities of the Congress, the national legislature. As a result, Congress began to create specialized regulatory bodies or agencies to carry out these tasks. While this made sense from a practical point of view, initially these entities were thought to occupy an uncertain status within a strict understanding of the Constitutional separation of powers. Now well accepted as what is sometimes called the "Fourth Branch," the activities of such agencies as the Food and Drug Administration, the Securities and Exchange Commission, the Environmental Protection Agency and even the Federal Reserve (the U.S. central bank) and the Internal Revenue Service (the principal federal taxing authority) -- none of which are overseen by elected officials -- are governed by a body of legal principles. Known as "administrative law," and in effect the law of government, these guarantees are intended to assure the fairness and legality of governmental actions as applied to individuals, private corporations, and the public generally.

All these principles reflect two important strains in American political and legal thought as structural protections against governmental overreaching: (1) the need for decentralization of governmental authority, both between the federal government and the states, as well as within the federal structure; and (2) the importance of legal constraints on the exercise of governmental power, sometimes summarized in the maxim that we are "a government of laws and not of men" (which translated into modern sensibilities should be understood to include women as well). That structure may work reasonably well for internal matters, but external pressures can create stresses on the system. The United States is not only a federal system of

limited and enumerated powers in the central government in which every governmental action must be supported by legal authority; it is also a state in the international system, and since the mid-20th century at least has been a global superpower as well.

Since the beginning of the Republic, there has been a tension between the domestic rule of law and the need for decisive and frequently rapid mobilization to respond to external threats. As might be expected, the latter dynamic has tended to attenuate the notion of the rule of law, in particular by encouraging a concentration of power in the hands of the Executive headed by the President, who is the head of state and commander-in-chief of the armed forces. These competing forces can be readily identified in the sequence of cases handled by the Supreme Court dealing with the Guantánamo detainees. With the increase of international institutions also governed by the rule of law, such as the World Trade Organization, the situation becomes ever more complex. It is not at all clear that the same jurisprudential approach ought to govern, for example, the President's responses to both nuclear threats from North Korea and the domestic implementation of a judgment of an international tribunal. As globalization proceeds and affects the municipal legal system of every country, including the United States, the appropriate treatment of the interface between international and domestic law has become a central challenge to our legal system.

III. A CULTURE OF RIGHTS AND COURTS

American political and legal culture is also characterized by an inherent individualism and the notion that natural persons have rights that predate even the formation of government, whose authority ends where individual rights begin. This deeply-held distrust of governmental intrusion into individual rights is probably as strong today as it was at the time of the adoption of the Constitution, to whose original text a Bill of Rights was subsequently added to assure ratification. The U.S. Bill of Rights has influenced other cultures, such as the French Declaration of the Rights of Man. But the emphasis on the individual as a rights-holder is unusually if not uniquely American.

A British lawyer, for example, told me that UK citizens do not have rights, but "liberties," defined as an individual's freedom to act as he or she chooses in spheres in which the government declines to intrude. The American notion is very different, and is a shared value among many sectors of the public, ranging from the extreme left (often associated with the label "liberal") to the far right ("conservative"). Although rights of Constitutional origin tend to dominate academic and political discourse, Americans have numerous other rights as well. These include statutory entitlements, as well as broad-gauge opportunities to assure the legality of actions taken by the Executive Branch, the Congress, and administrative agencies that affect not just the individual, but the public at large.

The American concern for both rights and the integrity of governmental structures -- both vehicles for protecting the interests of individuals, private interests, and the public generally -- perhaps, inevitably leads to an emphasis on law in public life. A corollary to this proposition, frequently heard, is that a right without a remedy

is no right at all. Consistent, then, with an emphasis on the rule of law is the importance of courts in our system. The United States has a perhaps justifiable reputation as a litigious society, in which private parties settle their disputes by resorting to a third-party neutral judge with coercive powers. But in the public sphere, the courts perform an additional, crucial role central to American jurisprudence: that of policing the *government's* behavior to assure that it conforms to the law. Frequently initiated by private parties acting out of self interest, these citizen plaintiffs are sometimes called "private attorneys general" in recognition of the benefit they provide to society as a whole by assuring that governmental authorities operate strictly within the bounds of the law.

The U.S. Supreme Court, in the famous case of *Marbury v. Madison,* declared the prerogative and, indeed, responsibility of the courts to measure acts of Congress against the legal constraints identified by the Constitution. Less well appreciated is the role of judicial review in a statutory context. Again, although they may be on different sides of an issue, citizen plaintiffs, non-governmental organizations, and business interests tend to agree on the utility of judicial review as necessary both to vindicate private rights and to correct public wrongs. While I hesitate to say that this reliance on courts is uniquely American, the emphasis on the judiciary as a decision-maker of last resort is certainly highly characteristic. I saw this very clearly when negotiating a set of non-binding guidelines on an environmental issue for the State Department. Not one country supported the U.S. proposal for judicial review as a useful component of the overall scheme, and most delegates from other countries actively opposed the suggestion as a prescription for delay or obstruction.

That is not to say that every American is convinced of the utility of this approach. It has become an article of faith among certain politicians to criticize the judiciary as "activist," which is not intended as a compliment. But it is worth noting that some of the very same politicians now decrying judicial activism have benefited from such actions as the U.S. Supreme Court's termination of the Florida recount in the 2000 presidential elections. Although it will likely never be entirely free from controversy, the role of the judiciary in American political and legal culture seems unlikely to recede in importance in the foreseeable future.