

FEDERAL JUDGES AND RULE OF LAW INITIATIVES: AN EPILOGUE WITH NOTES FOR SCHOLARLY INQUIRY

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The preceding remarks by the panel of federal judges, four of whom are from the Central District of California and the other, with long experience in the Federal Judicial Center, provide a rich picture of the work abroad by federal judges in the name of the rule of law. This epilogue will seek to put their individual stories into a larger context. I will not repeat the remarks of the federal judges, but I will offer a few preliminary observations about how they may fit into the general process of exchange and promotion of the rule of law. My intent is not to explain the remarks or the commitment of the federal judges to this enterprise. Their enthusiasm and commitment are evident in their own statements. I think this exchange is worthy of more scholarly attention and therefore write this brief epilogue mainly to encourage more research.

There is vast literature on the rule of law industry, criticizing the various approaches that have been taken toward building the rule of law. Among the most thoughtful commentators on rule of law assistance—termed more generally “democracy aid”—from the inside is Thomas Carothers of the Carnegie Endowment for International Peace. Carothers in a recent retrospective notes the increase in annual expenditures from \$1 billion in the late 1980s to about \$10 billion today.¹ Taking stock of the 25 years of democracy aid, Carothers notes some progress, but also many systemic problems. He argues in fact that the first generation of aid relied too much on “the strengthening and reform of key state institutions, especially those checking the

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1. Thomas Carothers, *Democracy Aid at 25: Time to Choose*, 26 J. OF DEMOCRACY 59, 60 (2015).

power of centralized executives, such as . . . judiciaries.”² He also believes that a problem remains today with a failure to “move beyond stale judicial-strengthening efforts that rely on rote best practices training while ignoring the broader array of entrenched obstacles that prevent ordinary citizens from achieving justice.”³ The problems of these approaches and democracy aid more generally, he contends, relate also to “a feebleness of policy commitment” today to democracy and the rule of law in relation to the priorities of national security and wars on terror.⁴ USAID, he notes, has cut spending.⁵

The personal testimonies of the federal judges at Southwestern may reflect the persistence of old and largely unsuccessful models, as Carothers would maintain. The judges at Southwestern certainly recognize the difficulties and the challenges of facilitating enduring changes. Carothers might criticize the tendency reflected in the individual stories to use United States models in promoting reforms, such as bail, relatively long reasoned opinions, codes of judicial ethics, and oral trials—even though they also suggested an openness to other approaches. Of course, it is not an accident that United States models appear. It is not imperialism. United States judges are best able to advise on United States approaches and indeed are invited because of their expertise in those approaches. The general theme of Carothers and many other critics, however, is difficult to counter either with personal narratives or comprehensive evaluations. The enduring successes of these missions—and rule of law assistance more generally—are subject to question and difficult to show.

Yet the overwhelming message that comes from the remarks, by the federal judges, is how much they enjoy their missions abroad and how much they are appreciated when they travel or work at home with judges from abroad. The story is certainly more complex than what Carothers and other critics suggest.

My own work on globalization suggests that these programs do not occur unless they fit the interests of the importers and the exporters. The interests do not have to be the specific agenda of reform that ostensibly motivates the activity—even if the activity itself directly focuses on the reform agenda. It is instructive to look at the histories of prominent programs of exchange. Giles Scott-Smith, a historian based in the Netherlands, has studied the impressive Ford Foundation

2. *Id.* at 61.

3. *Id.* at 64.

4. *Id.* at 70.

5. *Id.* at 71.

funded programs for the teaching of international law at The Hague after World War II.⁶ The programs taught international law to individual students from developing countries in particular. Whether the participants came away as international lawyers or not, Scott-Smith shows that the Ford Foundation commitment to funding the program during the Cold War depended on the belief that the networks of individuals who passed through the program, united perhaps by some orientation toward a noble vision of law, would turn out to be enduring friends of the United States in the Cold War.⁷

Similarly, the Institute of International Education Exchange, which administers the Fulbright program among other programs of exchange, had as one very clear mission the creation of cosmopolitan Americans who would support a US foreign policy that strongly engages with the world—versus isolationism and retreat from that engagement.⁸ The idea was that Americans who went to Europe and elsewhere would make friends and develop interests that would continue throughout their lives.

Other programs of international exchange more explicitly teach norms of governance—for example in law or in economics—consistent with a market economy that is open to trade and investment. Jorge Dominguez, for example, documents the important role of Latin American economists educated in the United States in both liberalizing Latin American economies and in promoting transitions to democracy in the 1980s and 1990s.⁹ The cohort of economists from different programs met and befriended each other in the United States.

I could imagine enthusiasm for judicial exchange with respect to all these interests; in creating friends abroad, in developing more cosmopolitan judges at home, and in promoting openness to United States friendly norms. Steps toward judicial reform are indeed consistent with promoting norms of governance that allow a stronger role for markets and private power, in part by providing strong judicial means to question governmental policies. They promote a stronger role for the judiciary, which goes against the relatively strong role of

6. Giles Scott-Smith, *Attempting to Secure an 'Orderly Evolution': American Foundations, the Hague Academy of International Law and the Third World*, 41 J. OF AM. STUD. 509, 509-510 (2007).

7. *Id.*

8. *See About Us*, INST. OF EDUC., <http://www.iie.org/Who-We-Are/Mission-and-Values#.V84eKTt4048> (last visited Sept. 5, 2016).

9. Jorge Dominguez, *Technopols: Ideas and Leaders in Freeing Politics and Markets in Latin America in the 1990s*, in *TECHNOPOLS FREEING POLITICS AND MARKETS IN LATIN AMERICA IN THE 1990s*, at 12, 15 (Jorge Dominguez ed., 1996).

the state and weak role for the judiciary that has characterized France and countries influenced or colonized by France, including those in Latin America.

One can be more specific in speculating about the dynamics of federal judicial exchange. Perhaps there is something particularly special about federal judges. I was intrigued especially by the statement by the Honorable Ronald Lew in which he declared some independence from funding authorities and specific agendas behind judicial exchange: “You have to remember that we are all judges; we carry our own message. We will deal with the rule of law, but we stand apart from what their mission is. We only carry the courts’ message, pure and simple.”¹⁰

The question is, what it means to showcase United States federal judges abroad. Sociology teaches us that individuals are selected for and learn the behaviors associated with positions in particular fields.¹¹ Those who become federal judges share many features. Federal judges are talented, confident, act with a certain amount of gravitas, and both expect and receive respect. As the quotation shows, they do not necessarily follow the orders of those who try to control them. If we think of the position of most judges in the world outside the United States, they do not command that kind of respect. They may be seen as bureaucrats or mere functionaries of the legal system. In short, whether federal judges have particular expertise to make major strides toward the rule of law or judicial administration in the complicated political and social contexts outside the United States, as Carothers might remind us, they model a certain kind of behavior that evinces a formidable position for judges and law.¹²

Scholars and legal reformers frequently argue that various initiatives in law and development do not make fundamental changes in bringing the rule of law, but perhaps, they have suggested from time to time, programs such as legal aid may serve as Trojan Horses making subtle changes that, over time, will bring more fundamental change.¹³ While there is reason for skepticism about the power of Trojan Horses

10. See Bryant Garth et al., *Judges Teaching the Rule of Law Abroad*, 23 SW. J. INT’L L. 73, 86 (2017).

11. See PIERRE BOURDIEU & LOIC J. D. WACQUANT, *INVITATION TO REFLEXIVE SOCIOLOGY* 12 (1992).

12. See Annelise Riles, *Legal Amateurism*, in *THE SEARCH FOR CONTEMPORARY LEGAL THOUGHT* (Chris Tomlins & Justin Desautels-Klein, eds., forthcoming 2016) (Annelise Riles writes of the importance of what she calls “amateurs” in legal reform.).

13. See, e.g., Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored ‘Rule of Law’ Projects in the People’s Republic of China*, 18 UCLA PAC. BASIN L. J. 64 (2000) (noting a skeptical discussion of this theory).

in these contexts, there are some precedents in legal reforms. In particular, there are numerous accounts of individuals from developing countries studying law in the United States, admiring the stature and position of corporate lawyers, and creating a similar and quite successful version of the corporate law firm in their own countries.¹⁴

Only qualitative research on the particular influences of encounters with federal judges on the careers of individuals abroad would begin to provide material to understand the actual influence of these programs. We would have to do more research. I have other research questions also that I think would be interesting to pursue. One is simply who goes on these missions. One intriguing aspect of the panel's remarks at Southwestern is the role of ethnicity and language in building rapport abroad. How important are these aspects of the program, which provide one more argument for diversity among the judiciary? I wonder also what role these kinds of activities play in building judges' reputations and careers within the judiciary. Are the participating judges outliers or the most respected individuals? Does everyone want to participate or only a few? And, very simply, are the programs and the numbers of judges expanding or contracting?

Finally, going back to the role of exchange in building support for more engagement with the world outside the United States, I wonder if the more cosmopolitan judges are attracted to these programs and the more "American first" individuals skeptical of foreign engagements are resistant. Or does the travel actually build the cosmopolitanism that the Fulbright and similar programs seek? Does it translate to different perspectives—more deference perhaps—for example, in cases involving international comity?

It may be excessive to build too much scholarly concern around these activities of federal judges of the central district and elsewhere, but the activities continue and after all employ substantial human resources. They also reflect interests and ambitions that merit more scholarly visibility.

14. See, e.g., YVES DEZALAY & BRYANT G. GARTH, *ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF AN EMPIRE* 242-43 (2010) (discussing the thriving Korean corporate bar).

