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Brief Reflections on the Topics of Judicial Independence, Transparency, and Accountability

It is a special privilege for me to represent the United States on behalf of our federal judiciary's International Judicial Relations Committee at this Fourth International Summit of High Courts. In my official capacity, I wish to extend the greetings of our Chief Justice, The Honorable John Roberts, and his best wishes for the success of this important symposium.

The principle of judicial accountability is, of course, interwoven with that of judicial independence. If a judiciary and its judges have no actual autonomy, the concept of accountability has so narrow a meaning that there is no use in even attempting to give it definition.

At the outset, it may be useful to distinguish institutional independence, by which we mean a judiciary free from interference by other branches of government, from the independence of judges, by which we mean the protection of the judge from extraneous influences on his or her decision-making.

The independence of the United States federal courts is owed in large part to three men who played seminal roles in shaping its structure and functions. The first was the French *philosophe*, Baron de Montesquieu, whose influential treatise *De l'Esprit des Lois*, inspired the Framers of our Constitution to build on the principles of separation of powers

and checks and balances, thereby defining the judiciary as a wholly separate branch of government rather than as an administrative extension of the State. The second was our first Chief Justice, John Marshall, who in a seminal High Court decision, *Marbury v. Madison* (1803), laid the cornerstone that undergirds the Supreme Court as the ultimate guarantor of the United States Constitution: the doctrine of judicial review. And finally, Chief Justice Charles Evan Hughes, who led the resistance to President Roosevelt's plan to pack the Supreme Court and the lower federal courts with judges subservient to the Executive Branch. Of even greater significance was Chief Justice Hughes's success in 1939 in persuading Congress to grant our federal courts administrative and financial independence from what was until then supervision by the United States Attorney General.

The components of a guarantee of the independence of individual judges are familiar: insulation from extraneous influences both external and internal, security of tenure and remuneration, and personal and family security. In the United States, the security of tenure and remuneration is written into the Constitution itself with its guarantees of a lifetime appointment, a prohibition against any reduction of salary or benefits, and a ban from removal from office except in instances of only the highest of crimes. Judges and their families and our courthouses are under the physical protection of the United States Marshals Service, a federal law enforcement agency that works directly under the supervision of the Federal Court Judicial Conference. And while we often do not think of it in terms of judicial independence, the necessary tools and accouterments of doing the task of judging – decent working conditions, adequate and competent support staff, manageable caseloads, and access to continuing education are

also essential components of a judge's autonomy. On this latter subject, the Federal Judicial Center, with a budget of nearly $30 million provides ongoing training and instruction to judges and their staff on subjects ranging from new developments in the law to training in the latest computer technology.

Turning more directly to the question of accountability itself, an initial consideration is whether one looks to the judiciary as an entity or to the judges themselves. And by accountable do we mean, as Professor David Kosar asks, accountability as a singular virtue, that is, a normative construct of desired behaviors, or de mean by accountability the development of institutional arrangements that are intended to insure public confidence in the performance of the judiciary as a collective whole? And finally to whom is the judge or the judiciary to account? To the Executive, to the Legislature, to the higher courts, to chief judges and disciplinary bodies within the judiciary itself, to his or her peers, to the litigants and lawyers who appear before the judge, or to the public at-large?

To some degree, the answer is shaped by whether a judiciary is based on a continental administrative law model or on the Anglo-Saxon common-law tradition. Dr. Sophie Boyron draws an interesting contrast between judicial accountability in France and in England. Her thesis is that while the French judiciary is structured as a collective entity which tends to deny a public personality to individual judges, in England individuality prevails and the name and office of the judge is linked for better or worse to the judicial outcome for which he or she is personally responsible. As a result, when one speaks of judicial accountability in France, the reference is typically to the perceived

successes or failures of the judiciary as a whole, while in England the praise or blame falls on the judge herself.

The United States, of course, has historically copied and followed the English model, such that our rules of accountability are more often concerned with the normative behavior of the individual judge. Significant among our "rules of virtue" is the requirement that judges file annually comprehensive and publicly accessible financial statements detailing their investments and their personal or family financial dealings, including gifts and loans. By law a judge may earn no outside income, except for a limited amount for teaching and writing. Each judge must maintain a conflict list requiring his or her recusal from any case in which he or she has any financial or personal interest, no matter how miniscule. A weakness of our system, from my perspective as a judge, is the relative absence of any formal mechanism of judicial evaluation, a concept that is resisted in a system in which the judge is largely accustomed to working as a solitary actor. The one exception is a requirement imposed by Congress that judges report every six months any civil case to which they are assigned that is more than three years old, and any motion that has gone undecided for more than six months. As the reports are made public, they do provide some measure to the judge of how he or she is performing relative to his or her peers, at least on a level of decisional efficiency.

The mechanisms that are intended to insure accountability on the part of the United States federal judiciary as an institution are for the most part intended to instill public confidence. And I would argue that they have largely succeeded in the sense that, in spite of often heated debate over constitutional decisions and judicial nominations, opinion polling consistently ranks the federal judiciary, along with the military, as the

most trusted of American institutions. I would identify among the successful confidence-building mechanisms the following:

The first is transparency. With the exception of cases involving sexual crimes against children, all proceedings, criminal and civil, are noticed in advance and fully open to the press and public. All judges' decisions, no matter how minor, are electronically posted on the court's docket where they may be electronically accessed by members of the public.

The second is neutrality. Some years ago, after several publicized instances in which Chief Judges were accused of assigning cases among their colleagues for ideological or political reasons, the authority of Chief Judges to assign cases was eliminated. Now all cases, civil and criminal, are assigned to judges by a random computer selection.

The third is redress. Each of the Circuits into which our courts are organized is required to maintain a neutral panel of trial and appellate judges to hear complaints by citizen-litigants of inappropriate behavior by the judge assigned to their case.

The fourth is less a mechanism than the expectation permeating our judicial culture – and reinforced by our Courts of Appeals - that judges will not only make reasoned decisions, but will explain at sufficient length in writing the thought processes by which a decision was reached. A reasoned decision serves as an effective check on arbitrariness, and a guarantee of the right to an effective appeal.

Finally, and this is the crown jewel of accountability in the United States system: citizen involvement through our system of juries. In civil or criminal cases of any significance, any litigant can insist that findings of ultimate fact, including guilt or innocence, be made not by the judge, but by a panel of randomly selected citizen-jurors.

Each year millions of citizens are called to the state and federal courts to serve as jurors. As a result, most adult citizens have acquired a first-hand and by and large positive experience with the courts. As well as a practical understanding of how the court and its judges function on a daily basis. Collectively, these five mechanisms have well-served the public interest and the perpetuation of the independence of our federal courts.