

DEMOCRACY AT HOME*

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Every day brings more news about the breakout of democracy in the Middle East, driven by the successive and successful elections in the Ukraine, Afghanistan, Palestine, Iraq, and even Saudi Arabia, and by the protests against continued Syrian domination of Lebanon. But I would like to sound a cautionary note amidst this celebration—which is, that we should not take our eyes off the domestic ball, lest we see erosion in the very democratic institutions at home that we are seeking to export.

The problem is that we take many of the basic building blocks of our market economy for granted. The rule of law, the protection of basic property rights and the right to contract, and the safeguarding of basic civil liberties such as freedom of the press are so commonplace here that I think we sometimes forget that they are just as essential to democracy abroad. I am, for example, on the board of an American Bar Association (ABA) spin-off called Central European and Eurasian Law Initiative (CEELI), which trains judges and lawyers in Eastern Europe and Eurasia. We helped train the Ukrainian judges who helped preserve the Orange Revolution there, and we have been training Iraqi judges at our new campus in Prague. But how many people here have heard of CEELI or any of its activities? More important perhaps, how many people know what is or is not happening in Iraq to establish the building blocks necessary

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to sustain the free market activities and job creation that are, in turn, necessary to support a fully functioning democracy?

I do not have any doubts that we will be able to do what needs to be done to provide these basic building blocks overseas. What I am worried about is that we fail to pay sufficient attention to the building blocks we have at home. I would like to give three or four examples.

Let me start with something that is well understood by this audience—namely, judicial confirmations. Even as we are training Ukrainian and Iraqi judges abroad, we possibly are on the cusp of a significant breakdown in our independent judiciary here at home. I had the pleasure recently of sitting next to the very bright and well-informed wife of the British Ambassador, who had heard me on an NPR radio show about judges and had some questions. She started the conversation with the observation that our Constitution evidently required sixty votes to confirm a Supreme Court justice. After I explained that that was not the case for judges, President Clinton's legislative affairs director, who had been eavesdropping on her other side, demanded equal time to argue that sixty votes were in fact required. I don't know who won the argument in her mind, but the very fact that there is an argument means that we are perilously close to losing one of the key attributes of the separation of powers, which is in turn a key attribute of our system of government.

Well, you might say, the separation of powers is a nuanced detail that isn't essential to democratic life—just look at parliamentary democracies. The problem is that the attack on confirmations is really an attack on the independence of the judiciary. It is Senator Schumer trying to calibrate the makeup of each circuit court according to each issue. One can envision the consultation and compromise that the Democrats are so eager to establish for the first time in our history—we will accept a Conservative on abortion if he or she is also soft on class actions, school choice, and maybe one or two other issues. Filibusters have long been used to force amendments in legislation. One reason filibusters have never before been used on judicial nominations is that it is hard to “amend” a nominee.

The basic reason advanced by Democrats for the filibuster is to block extreme right wing appointments. But the principal Democratic advisor on nominations, Professor Cass Sunstein of

Chicago, has done a survey and reported in a Washington Post op-ed some months ago that there is remarkable consistency between the judges appointed by Reagan and both Bushes.¹ Another study done by John Lott, who has taught at Chicago and Yale and is now at American Enterprise Institute (AEI), concludes that if anything, the current President's choices are *less* conservative than his father's or Reagan's.² The fact that the press has not reported these studies suggests how important they are. The point is that President Bush is not doing anything different from what Republican presidents have been doing for twenty-five years and he should not have to tack to the left just because he increased his margin in the House and Senate. Ralph Neas actually argues that because of the rare Republican hold on both the White House and Senate that Democrats similarly enjoyed for significant periods in the 20th century, the Democrats must be given the judicial filibuster to level the playing field and counter Republican gains at the ballot box.³

For me, a veteran of the Clarence Thomas fight, the answer to the filibuster question is simple. If the Democrats had wanted to block then-Judge Thomas, they could have easily demanded sixty votes, which we never had. But they did not, because it had never been done and no one thought it could be done. And the test of how strong that non-filibuster tradition was came in the measure of the virulence of the attack that was mounted against him and that almost succeeded.

Nan Aron of the Alliance for Justice has augmented Neas' explanation for the filibuster: Given the Republicans' control of the White House, the House, and the Senate, liberals must look now to the courts for the creation of new rights.⁴ If this rationale prevails, how could the Judiciary maintain the appearance of independence?

1. Cass R. Sunstein & David Schkade, *A Bench Tilting Right*, WASH. POST, Oct. 30, 2004, at A19.

2. See John R. Lott, *The Judicial Confirmation Process: The Difficulty in Being Smart* 11 (Feb. 14, 2005), at <http://ssrn.com/abstract=664006>.

3. See Ralph Neas, *Coming Soon to NY and DC: Revival of GOP's 'Obstructionism' Melodrama* (Aug. 8, 2004), at <http://www.pfaw.org/pfaw/general/default.aspx?oid=16939>.

4. See Lorraine Woellert, *What the New Court Will Look Like*, BUSINESS WEEK, Nov. 20, 2004, at 40, available at http://www.businessweek.com/magazine/content/04_47/b3909039_mz011.htm.

Another example of potential erosion of our democracy is our current tort system—a \$200 billion a year racket that constitutes an extraordinarily distorting tax on our economy. As an aside, I will concede that in resisting the blandishments, so far at least, of the trial lawyers, Europe on this score is way ahead of the United States—or way behind, depending on your point of view. But being a deregulator at heart, I am much less concerned about the tax than I am about the role that trial lawyers have assumed, along with the states' attorney generals, of conducting regulation through litigation on the theory that the Bush administration is not regulating enough. Not only are there not enough rights, there are not enough regulations. But obviously the courts should not be turned into mini-legislatures or mini-Environmental Protection Agencies.

There is, I will admit, something quaintly town meeting-ish about the trial lawyers' regulation game—after all, all they are doing is putting decisions in the hands of twelve ordinary people, tried and true, sitting as a jury. But this is obviously and profoundly anti-democratic because it allows the people of one state to act as a national legislature. It is not much comfort that in response we are now going to allow removal of these state cases to federal court, thereby contributing to the further centralization of authority that parallels the preemption doctrine, which has also been used to curtail this state-originated regulatory activity. All of this just bypasses the legislature and the carefully developed provisions of the Administrative Procedure Act (APA) that govern the regulatory state and that have been developed for more than fifty years to address extremely complex regulatory, health, safety, and environmental issues that depend so much on sound science. The issues governed by the APA procedures are thought to be so complex that they cannot ordinarily be left to legislatures alone but must be put through an additional expert agency filter. Now imagine taking these issues and dumping them in the lap of twelve jurors who, by definition, know nothing about the subject matter of their case.

For me one of the best examples of regulation by litigation is the recent lawsuit brought by mostly northeastern states' attorney generals against the five biggest Midwestern power plants seeking to curb their CO₂ contribution to global warming on a federal common law of nuisance theory. Of course such a

lawsuit is exquisitely ill-suited to address this problem, which is international in scope. For starters, dramatically raising utility rates in the Midwest will only drive already endangered manufacturing overseas to India and China where there is no regulation of any pollution at all, thereby doing nothing about CO₂ but making overseas pollution even worse than it is now. And since it is now clear that China exports its pollution to the United States, this lawsuit, if successful, will aggravate our own air quality, especially in Los Angeles. The additional fact that we would further undermine job creation here is evidently viewed as a plus by the Northeast, which thinks it benefits when the competing Midwest suffers. In these circumstances, of course, it is easy to see why judges are so important to fight over.

The transparency, democratic participation, and expert judicial review of the APA that the trial lawyers are so eager to destroy are also endangered by the European Union (EU). I am going to recklessly oversimplify and exaggerate what the EU does in order to quickly illustrate how they regulate. What the EU does, essentially, is delegate—either to Non-Governmental Organizations (NGOs) like our environmental groups or to the leading incumbent firms—the development of draft standards that then become the de jure regulation, usually adopted essentially without notice and comment, any hearings, or judicial review usually of the ultimate outcome. When the rule writers are the incumbent firms, the rules are written naturally to protect their ways of doing business and their market share, and to raise barriers to entry. Because this does raise prices by making markets less competitive and less innovative, and thus renders EU firms less competitive worldwide, the EU is now trying to export this procedural and substantive approach to the rest of the world. This export imperative is even more important with NGO-developed rules, which are even more anti-competitive than rules developed by the leading companies. Remember that this kind of delegation was rejected two generations ago in *Schechter Poultry*.⁵ It is true that the Supreme Court recently rejected in *American Trucking* an attempt to declare our Clean Air Act standard setting process equally forbidden because of the lack of cost-benefit standards.⁶ But the

5. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

6. Whitman v. Am. Trucking Ass'ns, 531 U.S. 437 (2001).

Court nevertheless made clear that the States were bound by the cost-benefit analysis in *implementing* the standards—a discipline Europe is reluctant to follow.

The danger of this goes way beyond simple protectionism because sooner or later, if left unchecked, Europe's approach will swallow our provision for open and transparent rule development, subject to the checks and balances of review by the executive and legislature, as well as the courts. The result will be profoundly anti-democratic, anti-market, anti-property and anti-everything we've spent 200 years building. Now, one of the reasons Europe says it resists judicial review is that they are terrified of trial lawyers, consumer citizens suits and class actions. That is a healthy attitude to have, and one I wish they could export back to us. But failing that, we could end up with the worst of both worlds—trial lawyers and EU-style regulatory outcomes. Since there is great interest in Europe in reforming this regulatory approach, I see the making of a great deal—we export our APA to Europe and import Europe's antipathy to trial lawyers.

One final example is one I am almost sure none of you has heard of. It has to do with independent corporate investigations by audit committees and independent outside counsel. The general phenomenon you do know from the Enron scandal. What you may not know is how this procedure has developed. The investigations used to focus on accounting; now the investigations extend to an examination of the "Tone at the Top", a totally open ended, standardless and subjective inquiry that can sustain any law firm for life and that makes a *Schechter Poultry* delegation look tame by comparison. The closest analogy I can think of is the Washington, D.C. scandal that inevitably morphs into an investigation of the investigation, and, if allowed to go on long enough, into an investigation of the investigation of the investigation. One day toward to the very end of Bush Forty-One, I was in a meeting with Judge Griffen Bell and his assistants, who were going to take over the Iran-Contra defense of Forty-One after he left office. I suggested that he should seek Justice Department permission for public funding of defending me and my counsel. I had retained Rich Willard who had run the Civil Division under President Reagan to help me in the investigation of the investigation, and I was thus warning the Judge that I fully expected the situation where there would be

an investigation of the investigation of the investigation and that the President's counsel's counsel would have to retain counsel—which I hoped would be Judge Bell. He laughed and said not to worry; I was going to have a long rest. But four months later, the Independent Counsel made Rich the target of his investigation, and so it came to be that the President's counsel's counsel had to retain counsel, though it was not Judge Bell.

Corporate investigations are similarly taking on lives of their own. Our society solved the government problem by eliminating the independent counsel. I think it is time we ended the corporate independent counsel, who are now increasingly running corporate America by dictating when companies can and cannot go to any public market for funding. The problem with both independent counsels is the lack of public transparency and accountability.

We are on a roll abroad, as they say, in promoting democracy in the Middle East and Europe. But let us not give away any of the attributes of democracy here at home.