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The Need for Solid Court Leadership: Reflections on the Fourth National Symposium on Court Management

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competition for resources and status are impacting the future. They also reveal a continuing debate on how to best govern the Third Branch of government. If the recurring budget crises of late say anything, they say that courts face an increasingly competitive environment and must adapt management and administration to this reality. One of the great promises of America has been the guarantee of access to justice. But it is no longer sufficient to appeal to platitude notions of “a constitutional requirement” when difficult questions are being asked of public institutions across the spectrum of their operations. Nor is it satisfactory to assert “but we’re different” when the public is demanding greater accountability, efficiency, and effectiveness from all government.

Our efforts, therefore, should be, as Chief Justice Durham noted at the symposium, focused on what we must do to improve public service, access to justice, and trust and confidence to bolster support for the courts. Even as this note is being drafted, forces invigorated by emerging concepts of social networking and democratic accountability are challenging establishments throughout the Middle East. While these developments may not play out in the United States quite the same as in the Middle East, it is naïve to believe that emerging modes of public engagement and power will be confined to one region of the world. We must recognize, as one of the working groups observed, that “courts are a big business” with significant reach and influence. They need many of the same things as other businesses—a sense of mission, a coherent management structure, differentiated bureaucracies, staff, programs, support services. But courts are also subject to the same forces impacting other institutions and require continued public support to remain legitimate and influential in the administration of justice. This requires an

### The Ten Principles for Court Governance

1. Well-Defined Governance
2. Systemic Input
3. Single Messaging
4. Competent Leadership
5. Commitment to Transparency and Accountability
6. Autonomy in Resource Management
7. Clear Lines of Delegation
8. Open Communications
9. Constructive Institutional Relationships
10. Clearly Defined Relationships for Governance
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intense examination of whether our current governance structures are sufficiently agile to meet the future. The remainder of this piece will focus on three areas of court governance discussed at the symposium: (1) the necessity for a well-defined governance structure; (2) the value of messaging; and (3) the importance of collaboration. It will conclude with some general observations.

The Need for a Well-defined Governance Structure

The American court system is unique. In spite of the philosophically aggregate nature of judicial power when it comes to cases, the administration of the system is highly fragmented, diverse, and compartmentalized. Unlike court governance in many nations where there is a centralized authority overseeing administration, for example a ministry of justice, our system evidences not only the principles of federalism but also diffuse governance bolstered by a healthy regard for organizational autonomy. The advantage of the system is that many concerns can be handled more nimbly, and locally, because governance is diffused across multiple layers and decision making is not dependent on a highly bureaucratized system that can stifle creativity and innovation. The disadvantage of the system is that this diffusion can make it incredibly challenging for the Third Branch of government to formulate, promulgate, and enforce common policy; balance unified administration and local autonomy; and protect large institutional interests from external forces and internal parochial concerns. Consequently, court leaders at all levels of the system must be cognizant of the need to coordinate administration both horizontally and vertically if the courts are to be treated as a branch of government and not a mere collection of independent operators.

The proposition that state courts need a well-defined governance structure that transcends personality and provincial interests, and is capable of formulating institutional policy, was clearly appreciated by most participants. What is less clear is how various systems implement an effective governance structure given the multiple and complex relationships resulting from the diffuse administrative constructs in many states. As one small group observed, “[A] well-defined governance structure is good, but implementation is difficult.” Within the domain of healthy governance structures is also the prerequisite that court leadership should be based on principles of capability, not arbitrary systems of seniority or constant rotation.

Notwithstanding the practical challenges, the need for a coherent governance structure is critical. As noted, courts face an increasingly competitive environment, and this competition extends well beyond the issue of securing adequate resources. While state budgets are pressuring courts to do more with less, the development of external processes for dispute resolution also presents a challenge to court legitimacy as more cases move into private dispute systems, largely in reaction to exploding costs and delay in the traditional court system. To remain pragmatically relevant in mission and purpose, state courts must implement dependable governance processes to address such concerns. Our governance structures must be effective in responding to new challenges and remain sensitive to the diversity of our courts. Implementing a coherent governance structure is a cross-cutting theme.

Speaking as a Branch of Government

Unlike the executive branch, which can formulate and promote a single message, or the legislative branch, which largely does not have to be concerned about such things (chiefly because the adoption of law is ultimately a single message notwithstanding the messy journey it can take), the judiciary sits between two extremes. The structure of courts, from strongly centralized, to strongly decentralized, to some combination of the two, makes it challenging to define
and promote coherent institutional messages. There are two important points to be made: First, the issue for courts in a competitive world is not so much about speaking with a single voice as it is about speaking with a single message. As one working group at the symposium observed, “Many people may be empowered to speak, but there should be one message.” Second, the governance structure of a system must be capable of engaging others in developing the message so that “competing messages [do not] cancel each other out.” In the absence of internal organizational engagement and external organizational discipline, mixed messages emanating from the judiciary will erode both institutional and parochial interests, given their mutual canceling effect.

The structure of many state judicial systems promotes fragmented administration and, therefore, fragmented messaging. Competition between state authorities and local authorities can undermine the institutional standing of courts and portray to the outside world a system based on factions that struggle to maintain organizational coherence. Moreover, the nature of judicial selection and, sometimes, the selection of key court personnel, can lead to a highly individualized environment that challenges the notion of single institutional messaging. Elected officials may see single messaging as detrimental to local concerns, particularly if that message is contrary to a desired outcome. At the same time, these very selection systems can bolster a judiciary’s institutional standing in the public by reinforcing the direct democratic connection between courts and the citizens they serve, a connection that is not dependent on the legislative or executive branches for its legitimacy.

These countervailing forces—the need for institutional messaging balanced against local concerns and the interests of elected officials—can make single messaging challenging but not impossible. This is where a coherent governance structure cuts across many of the issues courts face today. It is extraordinarily difficult to develop single messages in the absence of an internally coherent and externally legitimate governance structure. Indeed, the lack of a coherent governance structure means that the internal management of court issues—be they budget, accountability, or transparency—plays out on a public stage where the courts can appear fragmented, disorganized, and dysfunctional. In an age where the ten-second sound bite can have as much impact on the development and implementation of public policy as months of studious preparation, single messaging on issues of institutional consequence is critical.

“Given the natural constitutional and political tensions that are inherent in our system of government . . . the judiciary must work constantly to explain itself.”

Working Group 4 Report

Building Positive Relationships

Alexander Hamilton (1788) once observed that the executive possessed the power of the sword, the legislature the power of the purse, but the judiciary “It may truly be said to have neither FORCE nor WILL, but merely judgment.” Hamilton’s statement evidenced his belief that the power of the courts lies in the soundness of judgment, which was wholly dependent upon the ability of the courts to maintain the public’s trust and confidence in the administration of justice. Consequently, the judiciary enjoys public legitimacy so long as it can maintain it. The judiciary is different in form and function, and therefore, its legitimacy and relevance depends on building and maintaining positive relationships in three overlapping spheres: (a) with the other branches of government; (b) with the public writ large; and (c) internally within the judiciary.

The importance of maintaining positive institutional relationships that foster trust between branches of government is compelled by a natural tension in the design of American government. While we espouse a strict separation of powers, the fact is that American government is premised upon an allocation of powers across branches of government, thus blurring strict separation. This is a subtle but starkly different manner of distributing public governmental power. Unlike civil-law-tradition systems that adhere to a clearer form of separation of powers, the United States’ government is a system of interlocking powers that inevitably produces tension between the branches of government (Merryman, 1985). Consequently, being able to forge positive working relationships across government is critical in avoiding unnecessary and damaging confrontations. The importance of this effort extends beyond interbranch matters to embrace the public and the internal workings of the system. The public will not support that which it does not understand. And
single messaging and coherent governance requires internal relationships that work toward cooperation and not competition. These three spheres are of equal value and are critical to the principle that the judiciary’s legitimacy rests on the credibility of its judgment, and not only in regards to cases.

Conclusion
The Fourth National Symposium focused on a number of emerging issues, not the least of which is this: How effective are our governance systems and how might they have to be adjusted to address the new realities facing state courts? The current fiscal crisis is resulting in budget reductions so deep that they threaten the basic mission of state courts. If we are not careful in understanding that a “new normal” may be developing in regards to resources and public expectations, public support for state courts could decrease. Good governance, sound leadership, proper messaging, public engagement, positive relationships, and a focus on public service can buffer this new normal and reinforce the credibility of courts as a legitimate institution of government. As new forces reshape our world, we would be wise to constantly ask, “Are we doing the best we can and are we structured to meet the new challenges that are inevitably coming?”
ENDNOTES

1 See Hoffman, 1995. For a list of states whose constitutions contain open-court requirements modeled on those of the Magna Charta, see Buenger, 2009: 593, n. 91.

2 Opening Session, Fourth National Symposium, October 27, 2010.

3 Brian Z. Tamanaha (2004) observed, “[E]ven as politicians and development specialists are actively promoting the spread of the rule of law to the rest of the world, legal theorists concur about the marked deterioration of the rule of law in the West.”


5 The aggregate nature of judicial power is distinguished from the disaggregate nature of judicial power seen in many other countries. In the U.S., judicial power is not a series of specialized powers but rather integrated into an overarching judicial system. By contrast, judicial power in many other nations is disaggregated into compartmentalized special courts loosely tied together. Interestingly, many of these disaggregated systems, when it comes to the exercise of judicial power, have substantially integrated administrative structures.

6 See, e.g., German Federal Ministry of Justice, Directorate General; India Ministry of Law and Justice, Department of Justice; and Supreme Court of Japan, Judicial Assembly.

7 Working Group 1 Report, Fourth National Symposium, October 27, 2010.

8 Principle 4 asserts that the selection of judicial leadership should be driven primarily by considerations for competence and ability, not seniority or rotation.


RESOURCES


Fourth National Symposium on Court Management (2010). www.ncsc.org/4thsymposium

German Federal Ministry of Justice, Directorate General. “Judicial System.” www.bmj.bund.de/enid/9ebd79fd708fcb6dce09447ad60c01/0/aktuelles_13h.html


India Ministry of Law and Justice, Department of Justice. http://lawmin.nic.in/doj/welcome.htm


Supreme Court of Japan, Judicial Assembly. www.courts.go.jp/english/system/system.html#02_2
