[Judicial Independence]

[congratulations to Juan Jose and the team at the Planning Center for conducting this conference which is addressing the fundamental – and critical issues that are at the foundation of an effective judicial process. I am honored to be included on this panel. I can think of no more important topic relating to the comprehensive judicial system planning that is underway here in the City of Buenos Aires than the topic being addressed: the independence of the Judiciary. It is fundamental to the rule of law and to a free society. This is an issue that is important to governments everywhere and noted by almost every panelist yesterday. As I stated yesterday, although our systems of justice may differ in terms of process and procedures in the US and Argentina, we share common problems and, of course, common goals for our justice systems, including:

- providing a fair and just forum and mechanism for resolving disputes
- preserving the rule of law; and
- promoting public confidence in and access to the judicial process

All of these goals are intertwined, and fundamental to them, is the establishment and preservation of the independence of the judicial system.

As I mentioned yesterday, by way of background: I am a research professor at the School of Public Affairs at American University in Washington DC, and an attorney, having also practiced criminal and civil law, so I also bring the dual perspectives of both a practitioner and a researcher. I have been working in the field of judicial reform for many years, primarily through the technical assistance and training programs we conduct for state and local court systems, many under contract with the US Department of Justice.

Judicial Independence: What do we mean when we think of that concept? Regardless of our culture or our nationality, I believe we all approach this concept from the perspective that Judicial Independence entails being able to have an independent arbiter of disputes – one that is free of political or other influence – cannot be “bought” by special interest groups, brings an open but informed mind to the issues, and is unafraid to take a stand even if it will be an unpopular one.

How do we create and sustain judicial systems in which the independence of the judiciary prevails? And how do we attract – and retain -- judges to serve in the judicial system where judicial independence is key? These are critical issues being addressed at this conference and there are no easy answers.

There are a number of dimensions that are relevant which I think can be classified in terms of those relating to the (1) external framework/design of the judicial function; and (2) its internal operations.
In terms of the external framework for the judicial system, I think that three major factors are important:

(1) **Selection process**: How should judges be selected? Yesterday, referenced was made to a review process for qualifications and competency which seems ideal. But, then, who should conduct the review and make the selection? In the US, we have a combination of approaches. At the federal level, judicial appointments are made by the President for life and the selection is made by nomination and “vetting”, e.g., recommendations from local and national bar associations and political leaders, with review and recommendations by the US senate. At the state level, most judges are elected for specific terms (generally four to six years) with judges in a few states appointed. Clearly, this process, too, can be affected by political influences. To temper these, recommendations from the local bar association and other nonprofit NGO’s are often an important part of the process so that the pool of candidates for selection represents qualified individuals.

(2) **Retention provisions**: There are various provisions in the US for handling retention; at the federal level, judges serve for life unless they are impeached based primarily upon a finding of violating an ethical responsibility. The impeachment process generally entails a judicial/administrative fact finding process. At the state level, judges serve for fixed terms and therefore must be either reelected or reappointed when their term ends. There does not appear to be one “best way” but, in the US, most feel appointment is a better practice than election. Clearly, we do not want judges’ decisions to be the topic of campaigns. PLUS, campaigns cost money so campaign contributions are clearly a concern when judges are dependent upon them for their office.

(3) **disciplinary processes**: How to handle (a) abuses of judicial power; and (b) complaints regarding improper actions. Judges must be independent, but also accountable. They must also be protected from in appropriate complaints simply because the complainer objects to a decision. So the disciplinary process must be carefully structured to ensure a full, independent and nonpolitical review of the situation and a decision that is both fair and has the appearance of fairness. In the US, most states have an active board that handles grievances.

After we came to the conference last year and heard how much interest there was in judicial selection practices, we prepared a summary of the various provisions for judicial selection in the US, primarily at the state level, which I have brought.

In terms of the internal/infrastructure factors:
We know that having access to an independent judiciary also depends on a number of “infrastructure” factors to ensure that the judiciary is competent, ethical and professional in all aspects of its operations. Many of the other panelists have commented on these factors yesterday and today. I will list six:

1. **Access to Justice**, reflected in the procedures, policies, facilities and operations of the court system: how easy is it to get redress from the court system? What and how many forms need to be completed? What and how many lines must one stand in to file a case or get information about its status? What does it cost to use the court system? Examples of community outreach to handle “quality of life” crimes, and other crimes that affect the community such as described in the preceding panel, are an important example of how access to justice can be delivered;

   - Access to justice also entails providing **public proceedings in accessible** facilities; understandable proceedings that the average person can understand; affordable costs already mentioned, not simply for filing the case but for litigating it; provision of legal assistance, etc. – Legal Aid, public defenders, pro se assistance centers

2. **Expeditiousness and Timeliness**, reflected in case processing guidelines and timeframes; how long must a person wait for the court to act? And how many times must a person appear before the court makes its decision? When a court hearing is scheduled, does it occur at the time scheduled? Providing certainty and predictability in the court schedule requires sound management in the court as well as an interdisciplinary effort since the court cannot process a case “expeditiously’ if the prosecutor hasn’t interviewed the witnesses, or the defense counsel hasn't spoken with the defendant, investigated the case, and prepared the defense

3. **Equality, fairness and integrity**, entails a fair and reliable judicial process, consistency in judicial decisions, and clarity in judicial decisions; production and preservation of records – a process in which everyone is treated alike;

4. **Accountability in terms of its operations** – published reports of its activities and status of cases pending, transparency in budget expenditures, personnel practices, and mechanisms to ensure that outside influence does not pressure judicial decisions.

5. **Public trust and confidence**,— the judicial process must **APPEAR** as well as BE fair; application of judicial and other relevant canons of ethics and soundly designed disciplinary systems for judges and attorneys who fail to comply;
(6) **Professional court administration:** Development of professional administration of the courts in the US has been a major component of the capacity to maintain the independence of the judiciary and respect for its functioning. To sustain a judicial system that is separate and independent from political or other influence, the system has to be functioning efficiently in accordance with the “best practices” applicable to comparable organizations that conduct public functions, manage personnel and budgets, account for fees and fines collected, and perform other functions that require professional skills, expertise, accountability and transparency.

The relationship between JUDICIAL INDEPENDENCE and COURT ADMINISTRATION is therefore particularly important since, if the judiciary is to function as a separate branch of government, it must be able to manage its own affairs. Judges generally have little background in public administration and management as well as very little credibility in specialized management functions, such as budgeting, technology, procurement, etc., with the other branches of government so it is particularly important for the court system to employ the services of professional managers skilled in performing the management functions required of a large organization. During the past several decades, major developments have occurred to professionalize the management of court functions, almost all of which have been developed by nonjudges – and often, nonlawyers -- working to support the management functions of the court system which the judge have delegated to the court administrator, or CEO. All of these management initiatives have been designed to strengthen the judicial branch as an independent entity, to enable it to fulfill its constitutional mandates and to enable the judges to focus on their primary role – adjudicating disputes – and not be distracted by the myriad of administrative tasks running the court organization requires – supervising personnel, developing the court’s budget, procuring technology, scheduling cases, renovating the facility, etc.

**ADDITIONAL ISSUE: THE BUDGET FOR THE JUDICIAL FUNCTION AND ITS IMPACT ON THE INDEPENDENCE OF THE JUDICIARY:**

In addition to the practicalities of politics that are always present, the basic fact of life in the US, at least, is that the budget for the courts comes from the Legislature which, in itself, can potentially create a serious challenge to the independence of the court system. “The power of the purse is the power to control” and was a major factor in the American colonial revolution and declaration of independence from Great Britain in the 18th century.
If the legislature reduces the court budget, is it because of an unpopular decision that was made? And could it be possible for the legislature to reduce the judicial budget to a point where the court could not effectively function? thereby compromising the ability of the judicial system to carry out its intended purpose? And/or putting the court in a position to have to defer to legislative policies even if they conflict with judicial ones?

A major premise in the US has been that the judiciary must be separate and independent and free from political or other influence. In exercising the judicial function, one of our early chief justices, John Marshall, established the principle that our constitution was the **supreme law of the land**, that all laws passed by the legislature or the states and all actions taken by the President and the executive branch at both the federal and state governors had to comply with the provisions of the constitution, that the judicial branch had been entrusted to review legislative and executive actions to ensure that they did, in fact, comply with the constitution and that the independence of the judiciary was essential to perform this function – e.g., to preserve our constitution and assure that the actions of the other branches of both the federal and state governments complied with the constitution.

This is much easier said than done. Dealing with the realities of the budget process and its impact on the judicial function is a continuing challenge and makes the importance of the solid framework for the judicial function being developed in the Buenos Aires Planning process all the more critical. Recently, for example, the California Legislature drastically reduced the court budget resulting in massive staff layoffs. How these will affect the judicial function is still being determined.

**One Final Thought**

The City of Buenos Aires is in the process of developing a long-range plan for the justice system and, in particular, the judicial function. The plan is truly remarkable for its vision, comprehensiveness, insight and methodology. The planning process that it is fostering provides a magnificent opportunity to assess both the strengths and the limitations of the present justice system and to build the consensus that will be essential for developing and sustaining the improvements that will be introduced over the longer term. These elements are the building blocks essential for maintaining the independence of the judiciary. Based on the planning activities that have been undertaken to date, it is clear that this process is already well underway.

Instituting -- and sustaining -- judicial reform and ensuring a well functioning judicial system is an ongoing process. It is never finished. The clear plan of action,
definable goals, and ongoing evaluation processes that are imbedded in the strategic planning process that has been initiated for the City of Buenos Aires provide a strong and stable foundation for ensuring that the essential requirements to preserve and protect the independence of the judicial function are maintained and sustained.