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CONFERENCE ON ECONOMIC DEVELOPMENT AND THE JUDICIAL BRANCH

Judicial Independence: A Cornerstone for Economic Development

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Queridos colegas y amigos:

Es siempre un honor muy especial dirigirme a ustedes y muy en particular hacerlo en Puerto Rico, mi patria chica; y por eso también siempre empiezo con algunas palabras en nuestra propia lengua. Aunque me desempeño en mis labores profesionales siempre en inglés, nunca olvido que el español fue mi primer idioma, el idioma en que primero me relacioné con mis queridos y siempre presentes padres, el idioma en que primero leí, y el idioma en que dibujé mis primeras letras.
El idioma no es un filtro neutral de información. Todos sabemos que esas tempranas locuciones infantiles dejan una huella profunda e indeleble en nuestro espíritu, que las primeras palabras que balbuceamos calan hondo y su eco nunca desaparece de nuestras conciencias.

Y bien, esas palabras en castellano, porque ese es el idioma que felizmente todavía hablamos en Puerto Rico, traen rumores y recuerdos de valores culturales básicos que con el pasar del tiempo van a constituir la fundación de nuestro sentido del bien y del mal, de nuestro concepto maduro de la justicia.

Esos valores castellanos se codificaron en el monumento legal que fueron las Siete partidas de Alfonso el Sabio, redactadas en el siglo XIII, que sirvió de base a toda la legislación hispánica posterior y una fuente jurídica supletoria vigente todavía en el siglo XIX. Al hablar, al pensar en español, no me cabe duda de que vestigios de los valores allí expresados permanecen vivos en mi conciencia y en la de Uds.

Una de las muchas virtudes de las Siete partidas es que conciben el derecho como parte integral de la cultura en todos sus niveles: desde los pormenores más nimios de la vida diaria hasta cuestiones de la fe religiosa. Entre esas muchas relaciones se encuentra la codificación de las relaciones económicas, el intercambio de bienes entre los individuos, y las leyes que los regulan. No ofrecen códigos abstractos las Siete partidas, sino leyes pragmáticas para facilitar y mejorar las condiciones de vida. De eso es, precisamente, de lo que nos vamos a ocupar aquí hoy: del desarrollo

económico de Puerto Rico y su relación con su sistema jurídico. Hablaré en particular de la historia de la independencia jurídica en el mundo anglosajón, pero estoy muy consciente, por supuesto, de procesos paralelos en otras culturas, específicamente en la de lengua española, que es el otro integrante del sistema legal puertorriqueño.

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Thank you for your invitation and hospitality. It is always a great pleasure to come home to Puerto Rico—and it is especially gratifying to be here under the auspices of two foundations that support the work and the values of the two judicial systems that make possible, day in day out, a democratic order based on the fundamental principle of *equal justice under law*.

The Supreme Court of Puerto Rico and Puerto Rico's federal court can and do work harmoniously in the public interest, with mutual respect for their distinctive roles in a system of ordered liberty. Both institutions should be a source of pride to the people of Puerto Rico—their senior members (Frederico Hernández Denton on the Supreme Court and Juan Torruella on the First Circuit) are justifiably respected and admired by lawyers and judges throughout the United States.

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When I was first asked to speak about the relationship between "judicial independence" and "economic development," I feared that any speech I could give would be unforgivably dull. After all, the relationship between "judicial independence" and "economic development" seems obvious to us today; I worried that any discussion would be nothing more than a steady stream of tiresome truisms. As I reflected more on the task at hand, however, I realized that this was not a problem at all. Even truisms can be a basis for understanding and a cause for self-congratulation.
We have so thoroughly absorbed some basic propositions about human nature and the democratic

state that these concepts—perhaps even the whole structure of our democracy—have largely faded into the background.

More generally, we now accept that the rule of law is necessary for economic development. Without the rule of law, individuals will not enter into contracts with their countrymen; businesses will not adequately plan for their futures; and foreigners will not invest their fortunes.
We also accept that judicial independence is a critical component of the rule of law. We need an independent judiciary to enforce property rights and to check government abuses of power.

But we haven't always widely accepted these propositions. Our general acceptance of the connection between the rule of law and economic development has been hard fought. Even today, some may not yet be fully convinced of this connection, instead believing that economic development and the common good can be achieved if we entrust enlightened rulers with powers not subject to review by citizens or review by law.

In an effort to persuade the remaining skeptics, or simply to keep us all from complacency, I venture to pull from the background to the foreground the concepts of the rule of law, *generally*; judicial independence, *specifically*; and economic development.

Rather than even try to provide a comprehensive overview of this sprawling topic, I will focus on how judicial independence supports economic development by protecting three tenets of the modern democratic state: the indispensability of private property; the enforcement of laws; and the separation of powers.

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First, we now generally understand that private property is an indispensable element of both a free society and a prospering economy. By protecting private property, therefore, an independent judiciary protects our society and economy.

Private property makes freedom possible.[1] Indeed, one could argue that property rights spurred the creation of the modern democratic state, as it was a desire to protect private property rights that led to the Magna Carta.[2] Centuries later, the late seventeenth-century philosopher John Locke posited that a limited government's foremost function was to protect property.[3] It is not surprising, then, that those present at the birth of the United States vigorously sought to protect private property rights. We do well to recall that Thomas Jefferson's first drafts of the Declaration of Independence pronounced that man was endowed with the unalienable right of "the pursuit of *property*," and not "the pursuit of happiness."[4] The Constitution and the Bill of Rights then made formal the American commitment to protect property rights.

In the two centuries since the Enlightenment, the Western world has endured revolution, depression, genocide, world wars, and terror. *National* socialism and *international* socialism, Soviet style, rose and fell. Through the tumult of the Twentieth Century, we arrived, at long last, at the modern consensus: private property is necessary to foster a public order that protects human rights and democratic freedoms. Abolishing private property to create only common property is, to put the matter bluntly, the first step on the path to totalitarianism.

It was the American writer Lincoln Steffens who famously announced, upon his return from Russia in 1921, that "I have [seen] the future, and it works."[5] Well, it turned out that the "future" did not "work," even on its own totalitarian and murderous terms. Even one of the earliest American enthusiasts of the Soviet regime, Max Eastman, eventually came to the conclusion that private property was necessary for a free society. Eastman explained his discovery of the importance of private property as follows: "It seems obvious to me now—though I have been slow, I must say, in coming to the conclusion—that the institution of private property is one of the main things that have given man that limited amount of free[dom] and equal[ity] that Marx hoped to

render infinite by abolishing this institution."[6]

Private property is also an engine of economic development. When property is held privately, the property owner has the incentive to put that property to its highest productive use.[7] In the aggregate, this leads to an efficient economy where nearly all property is put to its best use. Without private property, there are simply no incentives to invest in property, and the economy stagnates. Put differently, it is the institution of private property that allows Adam Smith's invisible hand to work.

An independent judiciary protects the institution of private property by enforcing rights and resolving disputes. Importantly, only an *independent* judiciary can protect the property rights of individuals from government seizure. And only an *independent* judiciary can fairly resolve property disputes between individuals, between an individual and the government, and between an individual and the friends of those holding political power. Without an independent judiciary, private property as an institution is in a precarious position, and each property owner's rights are uncertain. Where there is uncertainty, the economy stagnates.

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A second tenet of the modern democratic state is the enforcement of laws; it is a necessary predicate for both democracy and development. And again, an independent judiciary is indispensable to the rule of law.

By the enforcement of laws, or "the rule of law," I mean simply that "every case [is] judged according to general rational principles."[8] Or, to put the matter another way, the rule of law consists of "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power."[9]

And the rule of law is critical for economic development. Economies can expand in two

ways.[10] First, an economy can expand by increasing transactions among parties *within* a country. Second, an economy can expand by increasing its exports *to* foreign countries and attracting investments *from* foreign countries. Development from both home and abroad is necessary to create a robust economy, and the rule of law is needed to ensure both types of development.

The rule of law is needed to encourage transactions among parties within a country. The seventeenth-century English philosopher Thomas Hobbes postulated that, without a judicial system, contracts among traders would be scarce. He stated, "he that performeth first has no assurance that the other will perform after because the bonds of words are too weak to bridle men's ambitions, avarice, anger, and other passions without fear of some coercive power."[11] Modern development economists posit that the absence of a low-cost means of enforcing contracts is "the most important source of both historical stagnation and contemporary underdevelopment in the Third World."[12]

The rule of law also encourages foreign investment. When a society lives under law, foreign investors are assured that contracts will be enforced promptly and statutes will be interpreted consistently. More generally, the rule of law increases predictability and, therefore, reduces risk. Less risk, in turn, increases foreign investment. China, of course, is a notable exception, as its economy has grown tremendously even without the rule of law. This is, I submit, simply because business in China is so profitable. As China becomes less profitable, I suspect that its legal system will quickly prove inadequate, and foreign businesses will be less inclined to invest in China. Even now, wise investors rely on international arbitrators and agreements whereby Chinese state enterprises waive any claim of sovereign immunity, thereby opting out as much as possible from the legal system of China, dominated as it still is by the Communist Party.

To encourage these forms of investment—both domestic and foreign—an independent judiciary is needed to apply the law without undue influence by the political branches. Contracts

must be resolved and statues interpreted based on the dictates of reason, not politics or *personalismos*. Moreover, the judiciary must be sufficiently independent so that parties believe the judiciary will adjudicate cases fairly, even when the government is a party.

As an example of the importance of the rule of law to economic development, we need look no farther than Puerto Rico's rise from acute poverty in the second half of the twentieth century. Indeed, it is fair to say that Puerto Rico owes its economic development, and its robust participation in the national and international economy, to its distinctive commitment to the rule of law.

The establishment of a local court system, and of a federal court, in the earliest years of the colonial regime were an important part of the advent and development of the rule of law in Puerto Rico. So also was the birth and development of trade unions free of domination by employers or by the state—a notable contribution to the pluralism necessary for economic development, and one that was made possible by the rule of law in Puerto Rico even under American colonialism.

The biography of the great Puerto Rican labor leader and statesman Santiago Iglesias Pantín, founder of the island's original Socialist Party, is instructive. Under the Spanish regime—indeed, under the island's supposedly liberal Autonomist Government of 1897—Iglesias was imprisoned for the crime of organizing workers on the island. It was under the new military government of the United States that Santiago Iglesias won his freedom. And it was under the new American colonial regime that Iglesias proceeded to organize workers and, with the help of Samuel Gompers and the American Federation of Labor, to secure the right of Puerto Rican workers to organize unions.[13] It should surprise no one that, at the beginning of the twentieth century, the island's poorest citizens—Puerto Rico's poorest whites and its blacks—became enthusiastic supporters of the new American regime. In comparison with the old colonial regime of a decadent Spanish monarchical state, the new colonial regime provided basic human rights (including labor rights) under law.

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Third, and finally, the separation of powers is needed to ensure freedom and development. Judicial independence, almost tautologically, is necessary to maintain the separation of powers to check government abuses and promote economic development.

As the great French philosopher, the Baron Montesquieu—who, as you all know, greatly influenced the Framers of the American Constitution—famously observed: "There is no liberty if the power of judging is not separated from the legislative or executive power."[14] Montesquieu understood that as the political branches invariably seek to expand their powers, it is the judiciary that must police the constitutional boundaries between the branches. It is an independent judiciary, for example, that guarantees private property rights when a political branch threatens to take property without due process of law or without just compensation. Without an independent judiciary serving as a counterweight to the political branches, property owners will fear arbitrary and unjust takings of their property. More generally, potential property owners need assurance that an independent judiciary will protect them from arbitrary or abusive government practices. Without this assurance, investors hesitate, and development inevitably stalls.

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I have spoken at too great a length about how judicial independence fosters economic development by protecting the three basic propositions of a modern democratic state. Now, let me take a moment to more fully describe "judicial independence" as a concept and explore how we can maintain an independent judiciary.

In *The Federalist Papers*, Alexander Hamilton wrote that it is the duty of the judges to "stead[ily], upright[ly], and impartial[ly] administ[er]. . . the laws."[15] To do that, judges must have a degree of independence from the influence and power of the other sectors of government.

To be independent, judges must, at an absolute minimum, be protected by the constitutions of our national States from reprisals for their unpopular or even incorrect decisions. Judges, like referees in football, can make mistakes. Nevertheless, we must respect them and our constitutions must protect them even when they make mistakes, so long as those mistakes are made in good faith.

The Framers of our Constitution believed that an independent judiciary was an essential element of a pluralistic democracy. And they understood that the Constitution needed to provide specifically for that independence. Indeed, the Framers absorbed the lessons of the English struggle to establish an independent judiciary. Rather than leave the independence of the judiciary to evolution by happenstance, the Framers explicitly codified in the Constitution the provisions necessary to ensure an independent judiciary.

As a result of their foresight, our federal Constitution and those of the states and territories do a laudable job of assuring judicial independence. Judges in our country rarely suffer retribution by the political branches or the general public because of their decisions. No matter how strong the political will, removing judges from their posts is difficult. Our constitutions generally provide that judges serve during their "good behavior" or until their terms of office expire, rather than at the pleasure of political officeholders or public opinion. Additionally, we generally provide that the compensation of judges may not be reduced during their time of service, so that judges may not be effectively forced out of office by the power of the purse.

I recognize that the American system of distributing power is necessarily rooted in our own national experience. Every country must find its own way in such matters. Indeed, the Anglo-American common law system arose in an effort to limit the authority of the monarch, while the European civil law tradition developed in part to shift power from judges to the executive and legislature.[16] As a result of these disparate origins, the authority of the judiciary is narrower in civil

law countries than it is in common law countries, even though these countries share our political traditions in other respects. On questions of constitutional law, for example, the elected branch or branches of government have the last word in some Western countries, including many common law countries. This is, of course, what we mean by "parliamentary supremacy."[17]

Nevertheless, in the developed societies that successfully protect democratic freedoms and promote economic growth, it is *the judiciary* that has the last word in any particular lawsuit. The independence of the judiciary to decide particular cases in accordance with pre-existing principles of law—rather than in response to the dictates of party, faction, or government—is essential to a system of law in which differences of opinion are assumed and tolerated.

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Today, we consider the connection between judicial independence and economic development to be so self-evident that it barely warrants further investigation. But as I have suggested, it is only after centuries of turmoil and experimentation that we have created the modern democratic state, where pluralism and prosperity flourish in tandem.

The birth of the modern democratic state was a remarkable accomplishment, not an inevitable conclusion. And an independent judiciary, we now know beyond doubt, is a mainstay of the modern democratic state; without it, the state cannot protect human rights and ensure economic growth.

That an independent judiciary fosters the twin goals of freedom and development is indeed a truism, but it is a *truism*, because it is *true*—and trying to understand *why* it is true helps us ensure its survival and continuing vitality.

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Notes

1. *See generally* Richard Pipes, *Property and Freedom* (1999).

2. *See generally* John H. Langbein, Renée Lettow Lerner, and Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* 123-25 (2009); Richard Pipes, England and the Birth of Parliamentary Democracy, in *Property and Freedom* 121(1999).

3. *See* John Locke, *Two Treatises of Government* (1988) (1690).

4. *See, e.g.*, Benjamin Franklin, *The Compleated Autobiography* 413 (Mark Skousen ed., 2006).

5. Lincoln Steffens, *The Autobiography of Lincoln Steffens* 799 (1931). The original Steffens comment, as recorded by Steffens himself in his autobiography, was "I *have been over into* the future, and it works [,]" but the version quoted in the text is the one that has survived in the history and folklore of communism.

6. Max Eastman, *Reader's Digest*, July 1941, p. 39, quoted in Friedrich A. Hayek, *The Road to Serfdom* 104-05 (Phoenix Books, University of Chicago Press, 1944; 1967 impression).

7. As compared to when property is held in common and the incentive scheme leads to the so-called "tragedy of the commons." *See* Garret Hardin, The Tragedy of the Commons, 162 *Science* 1243 (1968).

8. Karl Mannheim, quoted in F. A. Hayek, *The Road to Serfdom* 72 (Phoenix Books, University of Chicago Press 1944; 1967 impression).

9. A.V. Dicey, quoted in F.A. Hayek, *The Road to Serfdom* 72 (Phoenix Books, University of Chicago Press 1944; 1967 impression).

10. Richard E. Messick, "Judicial Reform and Economic Development," 14 *World Bank Research Observer* 117 (1999).

11. Thomas Hobbes, *Leviathan* 110 (Continuum International Publishing Group, 2005) (1651).

12. Douglass C. North, *Institutions, Institutional Change and Economic Performance* 54 (1990); *cf.* Hernando de Soto, *The Mystery of Capital* (2000) (arguing, in part, that a strong legal system is needed to promote access to capital for poor citizens of developing countries).

13. *See, e.g.*, James L. Dietz, *Economic History of Puerto Rico: Institutional Change and Capitalist Development* 94-95 (1986). In addition to founding the island's labor movement and the Socialist Party of Puerto Rico, as well as several labor newspapers, Iglesias was elected to Congress as Puerto Rico's resident commissioner from 1932 until his death in 1939. *See, e.g.*, "Santiago Iglesias, Labor Leader, Dies," *N.Y. Times*, Dec. 6, 1939, at 32; *Biographical Directory of the United States Congress*, available at http://bioguide.congress.gov/biosearch/biosearch.asp (last visited March 22, 2010). *See also* Harwood Hull, "American Rule Has Helped Porto Rico," *N.Y. Times*, July 26, 1931, at E8 ("Senator Iglesias draws contrast between conditions today and under Spain.").

14. Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* 202 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748).

15. *The Federalist No.* 78 (Alexander Hamilton).

16. Paul G. Mahoney, The Common Law and Economic Growth: Hayek Might Be Right, 30 *J. Legal Stud.* 503 (2001).

17. On parliamentary supremacy, we do well to recall the teachings long ago of Bagehot: "The ultimate authority in the English Constitution is a newly-elected House of Commons. No matter whether the question upon which it decides be administrative or legislative; no matter whether it concerns high matters of the essential constitution or small matters of daily detail; no matter whether it be a question of making war or continuing a war; no matter whether it be the imposing a tax or the issuing a paper currency; no matter whether it be a question relating to India, or Ireland, or London—a new House of Commons can despotically and finally resolve." Walter Bagehot, *The English Constitution* 201 (Oxford Univ. Press, 1952) (1867). To the same general effect, Lord Bryce observed: "In England and many other modern States there is no difference in authority between one statute and another. All are made by the legislature: all may be changed by the legislature. What are called in England constitutional statutes, such as Magna Charta, the Bill of Rights, the Act of Settlement, the Acts of Union with Scotland and Ireland, are merely ordinary laws, which could be repealed by Parliament at any moment in exactly the same way as it can repeal a highway act or lower the duty on tobacco. . . . [T]here is in England no such thing as a Constitution apart from the rest of the law: there is merely a mass of law, consisting partly of statutes and partly of decided cases and accepted usages, in conformity with which the government of the country is carried on from day to day, but which is being constantly modified by fresh statutes and cases." James Bryce, 1 *The American Commonwealth* 242 (MacMillan 1913) (1888). The inclusion of the United Kingdom in the European Community and sister institutions such as the European Court of Human Rights established under the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 221, E.T.S. No. 5 ("European Convention"), has unavoidably placed limits on the supremacy of the "mother of Parliaments," including the Judicial Committee of the House of Lords that for so long served as the highest court in the realm. *See generally* Robert Bocking Stevens, Law and Politics: The House of Lords as a Judicial Body, 1800-1976 (1978). The recent creation of the Supreme Court of the United Kingdom, in its own building, and applying the European Convention and other EU laws, suggests that judicial independence in the U.K. may further erode the historic supremacy of Parliament. *See, e.g.*, Frances Gibb, "The Highest Court in the Land Opens Its Doors to the Public," *The Times* (London), Oct. 1, 2009, at 2.