JUDICIAL INDEPENDENCE:
A VIEW FROM THE U.S.

For myself and, I am sure, for my colleagues from the U.S., I would first like to thank our Argentine hosts, particularly Dean Monica Pinto of the University of Buenos Aires Law School, and of course the Center for Governmental Responsibility and the Levin College of Law of the University of Florida, USA, for sponsoring this extraordinary event today and tomorrow. I’m certain we will have a very important and meaningful discussion of topics relating to the rule of law.

I’m also honored to have been asked to be Chairman of the Panel on Judicial Reform – not only a Panel which will engage our plenary audience, but one which has been assigned first position on a very impressive agenda.

As you will see from your program, I will begin with a presentation on judicial independence from the perspective of an American Federal Judge and will be followed by the Honorable Luis Cabral, President of the Asociación de Magistrados Argentinos. We, in turn, will be followed by Dr. Luis Palma and Judge Elizabeth Jenkins who will speak respectively about Court Governance and Case Management in the Argentina and United States systems. You will find biographical details of our speakers in your programs.
Each speaker will have 15 minutes to make his or her presentation. (I promise: This will be strictly enforced, by a series of 5 minute/3 minute/and “Please Finish” warnings.) In the last half hour we will be pleased to entertain questions and comments from the audience, which we trust will always be succinct and to the point.

So I will begin.

Much has been written about “judicial independence” in recent years. What does it mean? How important is it in a society? In a given country, does it in fact exist? If not, what ought to be done to bring it about?

In the brief time I have, I am not going to discuss these questions in detail, critical as they may be.

I will start with an operational definition of “judicial independence.” In its essence, it means that judicial decision-making is free from political and personal influences and, at its best, is rendered strictly according to what the law – beginning with a country’s constitution – requires. Judicial independence is important because, in the context of governmental activity, it protects against abuses of power by the Executive and the Legislative Branches, and, in the context of private litigation, it precludes one party from effectively buying a decision from the Judge without regard to the merits of that party’s claim in law and fact.

What I propose to talk about is how judicial independence has been viewed in the United States over the years and, while I will not undertake direct comparisons between the history of judicial independence in Argentina – you Argentines know your history on the
topic far better than I – I will discuss certain aspects of experience in the U.S. that I believe parallel important aspects of the history of judicial independence in Argentina. Thus, I propose to talk about the American experience as it relates to the size of the U.S. Supreme Court; the backgrounds of typical nominees to the Court; the nominating process; the confirmation process; the average length of service of the Justices; and the process for removal of Justices. I will leave it to you, our audience, to consider whether and to what extent, there may be lessons to be drawn by Argentines based on the American experience or by Americans based on the Argentine experience.

I will not, then, be talking about what I believe ought to be done about improving things in your country or mine. Inferences in that regard, if any, will be for all of us to draw.

Our U.S. Supreme Court, is in many ways similar to and many ways different from the Corte Suprema of Argentina.

Our highest court, of course, has the final say as to the meaning of the U.S. Constitution and all federal laws. (Each of the 50 plus state supreme courts and those of the District of Columbia and territories, has the final word as to the meaning of their respective state constitutions and laws, so long as they do not conflict with federal law as determined by the federal courts, including of course the Supreme Court.)
What is the size of our Supreme Court?

In 1862 the Court had 10 members. Two Justices died and the number was reduced to eight. In 1869, Congress increased the number to nine, where it stands today.

There has been one notable effort to expand the number of Justices that was undertaken in 1937 by Franklin Delano Roosevelt, a very popular President, considered one of our greatest. Roosevelt was upset that a conservative majority of the Court in a series of decisions was finding unconstitutional much of his “social legislation” for pulling the country out of the Great Depression, his “New Deal.”

So Roosevelt proposed:

To grant the President the power to appoint an additional Justice for each sitting Justice over the age of eligibility for a pension. At the time 6 of the 9 Justices were over the age of 70, so if none of them chose to retire, Roosevelt would be able to expand the Court’s membership from 9 to a total of 15 Justices. Although Roosevelt declared that he was offering the plan for reasons of judicial efficiency, his real reason was apparent. He wanted to change the philosophy of the Court.

The public reaction to Roosevelt’s plan was intense and strongly in opposition. In all likelihood, the proposal never would have been passed by Congress because, as it turned out, several members of FDR’s own political party opposed it, but the issue became moot when one of the Justices announced his retirement, and a second Justice began to switch his vote to one of a more limited judicial review. FDR eventually got a majority of the Court more
favorably disposed toward his programs without having to increase the size of the Court. But the episode lingers as one of the most serious miscalculations on Roosevelt’s part.

More to the point of the present discussion, a later Chief Justice, William Rehnquist, has suggested that the defeat of Roosevelt’s court-packing plan “tended to preserve the independence of the Court as an institution.”

Since that time, there has really been no discussion about increasing or decreasing the number of Justices of the Supreme Court. It remains at nine.

**Who gets nominated to the Court?**

I won’t go into a great deal of history about this. In recent years, all but a handful of nominees have had prior service as federal appeals court judges, a few have been leading government lawyers (Harlan Fiske Stone and Robert Jackson were U.S. Attorney Generals; the most recent appointee, Elena Kagan, was U.S. Solicitor General) and one, who had been a prominent Governor and State Attorney General, was appointed Chief Justice without any prior judicial experience (Earl Warren of California).

Suffice it to say all of those selected have been bright, thoughtful jurists. And it is noteworthy that, with the accession of Justice Thurgood Marshall, an African-American, and Justice Sandra Day O’Connor, a female, to the Court, diversity has become a distinctive feature of what was previously an all-white male institution. Today, three of the nine members of the Court are female.
How do the Justices get nominated?

There is no formal process in place for this in contrast to what, as I understand it, is now in place in Argentina. As in Argentina, the President ultimately makes the nomination. But the President nominates the individual after much discussion with his advisors and often after broad consultation of the members of Congress. The name of the prospective nominee is very much public. Yet there is no formal or required posting of information about the nominee, his or her record, and no specified period of time for public comment.

That said, the informal process that does exist is one of intense public scrutiny; a public debate occurs which is nearly equivalent to the debate over who should be elected President – understandable, no doubt, because the person selected to the Court can quite possibly shape the law for decades to come, long after the President who named him or her has left office.

The media investigate and comment almost daily on the background and qualifications of each nominee in the greatest detail. And the process goes on for months, not days. On the other hand, it does not go on for years.

The public vetting of the prospective nominee, as I say, is intense. In fact, it has resulted in recent years in the withdrawal of some nominees – one who was found to belong to a racially exclusive club, another who was found to have regularly smoked marijuana when he was a law professor, and a third who was determined to be just plain mediocre (although he was also said to have spent more time visiting men’s rooms more than the normal call of nature might seem to require).
The Senate’s role, under the Constitution, is to advise and consent on the nominee and, to that end, in recent years it has held widely viewed nationally televised hearings where, sometimes asking serious questions, sometimes playing to the viewing audience, the Senators have subjected the nominee to searching questions.

In recent years, the hearings have not uncovered what might be called “bombshells,” although at the hearing on the nomination of Justice Clarence Thomas in 1991, the accusations of sexual harassment against him were, to say the least, sensational.

The nomination and Senate hearing of Robert Bork by President Ronald Reagan in 1987, deserves special comment in the context of our discussion because he was clearly rejected because of his philosophical views. He had been a law professor, Solicitor General of the U.S., and a member of the U.S. Court of Appeals for the District of Columbia Circuit. But he had a long “paper trail” of very conservative writings, sharply criticizing the Supreme Court’s approach to interpreting the Constitution and certain of its decisions, including its opinion in the case of *Roe v. Wade*, which established a woman’s right to have an abortion. Liberals, indeed, many centrists, civil rights and women’s groups, all rose up to oppose him. In essence, Bork advocated the judicial philosophy of originalism, *i.e.* stick with what the Founding Fathers meant at the time the Constitution was drawn up. Don’t “legislate” from the bench. Bork’s nomination was eventually rejected by the Senate in a vote of 42 Senators in favor and 58 against.

It was a very controversial episode. While liberals hailed the rejection as the salvation of the more liberal decisions of the Court (including the right to abortion), conservatives saw
Bork’s rejection as an inappropriate encroachment upon a duly elected President’s right to select individuals of his philosophical – one might even say “political” – persuasion for service on the Court.

But note: No one ever claimed that Bork would be taking his marching orders from Nixon or that he would even think about consulting with Nixon before making decisions, if he were confirmed to the Court. It was Bork’s legal philosophy that was his undoing even if his legal philosophy almost perfectly matched the legal philosophy of Richard Nixon, the President who nominated him.

A more moderate individual was eventually confirmed in place of Bork.

But the debate continues today: If a nominee has a philosophy 100% in harmony with that of the President who nominates him, is it proper for the Senate to reject the nominee because of his or her philosophical views, if he or she is otherwise honest, intelligent and productive?

Even former Chief Justice William Rehnquist, a very conservative jurist, has acknowledged “that there is a substantial body of opinion that Senators, as well as the President, may inquire into the judicial philosophy of the nominees.” Rehnquist believed that the Senate has every right to ask the President to maintain in the Court a balance between liberal and conservative opinion in the country as a whole.

There is an historical aside that I want to mention here. Some nominees to the Court who eventually were confirmed turned out to become decision-makers very different from what might have been expected. Hugo Black, a Senator from Alabama and a one-time
member of the Ku Klux Klan, became one of the most liberal Justices in the history of the Court – a staunch supporter of liberal policies and civil liberties, especially with regard to applicability of the guarantees under the Bill of Rights to the 50 States. Felix Frankfurter, a founder of the American Civil Liberties Union and a close friend and advisor to Franklin Delano Roosevelt with respect to Roosevelt’s liberal New Deal programs, became one of the most conservative Justices, a persistent advocate of judicial restraint; Earl Warren, a moderate Republican Governor of California who, as Attorney General of that State, had approved the internment of Japanese-American citizens during the Second World War, went on as Chief Justice to champion racial desegregation, the prohibition of school-sponsored prayer, expansive rights for criminal defendants, and more equitable voting rights for all citizens – the famous doctrine of one man, one vote; Justice William Brennan, a moderate Republican who had served on the Supreme Court of New Jersey likewise became a leader of the liberal wing of the Court, opposed to the death penalty and supportive of abortion rights.

I would say that these judicial “conversions” – I am taking some liberty with the word here – were no doubt due in considerable part to the fact that these men – once freed from political constraints and feeling themselves truly independent – pursued the legal philosophies they felt were the most faithful to the spirit of the Constitution.

And I might add that these Justices, as well as all others, have tended to serve on the Court for long periods of time. Supreme Court Justices serve for life; there is no compulsory
retirement age. The average tenure of a Justice over history has been less than 15 years, but since 1970 the average length of service has increased to about 26 years.

Although I said I was going to speak almost exclusively about the American experience with judicial independence in the context of the U.S. Supreme Court, I want to digress for a few moments and comment on how lower federal court judges are selected, then say a few words about how state court judges are selected and the relevance of this to the concept of judicial independence.

Federal district court judges (of which I am one) and federal appeals court judges are also nominated by the President, subject to the advice and consent of the Senate. They also serve for life; there is no compulsory retirement age. The quality and qualifications of the nominees tends to be high. There is some public scrutiny of the nominee (far less, to be sure, than of Supreme Court nominees) and there are Senate hearings (again, far less extensive than for Supreme Court nominees).

The confirmation process can take time. Sometimes it’s because the President is slow to nominate candidates for vacancies, sometimes because the Congress is overloaded with other business, including other nominations for judicial or executive office, and sometimes because the opposition party (now the Republicans, especially in this presidential election year) deliberately slows the process down so that their presidential candidate, if elected, will have the power of appointment.

But when there are vacancies, there is no such thing as a “temporary or surrogate judge” who is selected to serve until a permanent judge is selected.
All judges referred to in the Constitution, who are known as Article III Judges (the name is derived from Article III of the Constitution) must be confirmed by the Senate through the formal Senatorial advise and consent process. That, quite simply, is understood as part of the assurance of a truly independent Judiciary. (We do have what amounts to assistant judges, known as magistrate judges, who have limited jurisdiction, and who are chosen by the district court judges for 8-year renewable terms and we do have bankruptcy judges, obviously with jurisdiction limited to bankruptcy matters, who are chosen by the federal circuit courts of appeals, and who serve for 14-year renewable terms.)

Vacancies in federal district courts of appeals can last for some time. I myself am a senior district court judge, not fully retired but able to reduce my workload considerably and eligible to have an active judge succeed me, but it has been 3 1/2 years (one of the longest open vacancies in the federal judiciary today) and I am still waiting for my successor to be confirmed by the Senate.

Vacancies in judgeships can obviously increase case loads and slow down the disposition of cases, but we have some devices to cope with this, including bringing judges in from other districts or circuits who are not so busy and having them hear cases in the overloaded courts.

You probably have heard that many state court judges in the United States are elected by the voters at large. This is the case in varying degrees in approximately 40 of the 50 state courts and extends to state trial judges as well as appellate court judges. In many cases, these
elections may be contested, *i.e.* there may be challengers. In others, the judge may have to run on his or her record, without opposition, but he or she can be rejected by the voters.

The election of judges has been criticized by many persons over many years as permitting less than qualified individuals to make inappropriate campaign promises (*e.g.* to impose stiffer sentences on criminal defendants), but such elections nonetheless persist and there is no indication they will be done away with. On the contrary, in some states, as an unpopular state judge comes to the end of his or her term of office – be it 4 years, 8 years, 10 years or 15 years – extensive campaigns have sprung up to defeat those judges. And some of these campaigns have been successful. Several years back the Chief Justice of California, Rose Byrd, was voted out of office because of her consistent votes against imposition of the death penalty. More recently, three judges on the Supreme Court of Iowa were voted out of office because they had held that the Iowa Constitution validated same-sex marriage.

But note: None of these judges was removed during his or her term of office because of decisions that too often favored or disfavored policies of the Governor or the Executive branch of their State. They were legitimately – some might say “unwisely,” but nonetheless legitimately – voted out of office when their terms ended. Still, it is hard to avoid the conclusion that the election of judges – especially if their term of office is short, *e.g.* 4 years – may well chill judges in their decision-making; that is, they may tend to avoid making controversial decisions for fear that deciding a case a certain way may cost them their job at election time.
I want to conclude my remarks by returning to the federal judiciary and say a few words about the removal of federal judges.

The Constitution of the United States provides that federal judges shall hold their offices during good behavior (the Argentine Constitution speaks of “buen comportamiento”), but the U.S. Constitution also provides that removal may only be “for conviction for bribery and conviction of treason, or other high crimes and misdemeanors,” and the only method of removal is by impeachment. (Art. II, Sec. 4).

The impeachment process takes time. Ordinarily it begins when one or more members of the House of Representatives presents a charge of impeachment. The matter is referred to an appropriate committee of the House, which decides whether an investigation is appropriate. If, following the investigation, the House committee accepts one or more of the recommendations of impeachment, the matter goes before the full membership of the House, which can disapprove or approve the article or articles, which it only need do by a simple majority vote.

Thereafter the matter goes to the Senate which will issue a writ of summons to the respondent informing him (or her) of the date on which an appearance and answer must be made. A trial date will be set. The respondent may or may not choose to appear. Witnesses are called. The matter is debated, then the Senators vote. Conviction on an article of impeachment requires a 2/3 vote of the Senators present.

If the Senate votes to convict, it will remove the judge from office and may (it is not required to) decide to ban him or her (there has never been a “her”) from holding any office
or honor of public trust under the United States. This last decision only requires a simple majority vote.

No Supreme Court Justice has ever been impeached and convicted, although one came close and it was in fact because he was believed to be politically biased in favor of a President. The Justice’s name was Samuel Chase and his brush with impeachment occurred early in the 19th century. I’ll come back to his case in a moment.

Beyond that case, only a handful of lower court federal judges have ever been impeached, although some have resigned before the matter came to vote by the Senate.

The most recently impeached federal judge, a federal district court judge from Louisiana, who was impeached in 2010, was found guilty of criminal conduct – bribery, perjury and conflicts of interest. He was forever disqualified from holding any office or profit under the United States.

In 1982, another federal district judge was found to have accepted bribes. Even though he had been acquitted of the crime in court (a guilty co-defendant refused to testify against him), the judge was nonetheless impeached and Congress removed him from office. Congress decided, however, not to disqualify him from federal office, as it could have done. Then, in what can only be described as an oddity of American politics, this particular impeached judge ran for Congress (from the State of Florida), was elected, and has served in Congress ever since, for almost 20 years.

Just a few words about methods for removing state court judges:
State judges may be removed based on what state constitutions variously define as misfeasance, gross misconduct, gross immorality or the like. The method of removal varies from state to state. Impeachment, not unlike the process at the federal level, is one method, though it is said to be rarely used. Another method of removal is by “bill of address,” whereby the state legislature, often with the Governor’s consent, votes for the judge’s removal, which, historically at least, it can do for almost any reason, including laziness or illness. A few states allow for judges to be removed by a recall election, whereby voters sign a petition which, if a sufficient number of signatures is obtained, will result in a popular vote of removal or non-removal. A simple majority of the popular vote to oust the judge will result in his or her removal. But the more up-to-date method of removal of state judges is by judicial conduct commissions, where a duly constituted group of judges, lawyers, and laymen investigates a given judge and recommends a sanction to the state supreme court, which may or may not choose to follow the commission’s recommendations.

I want to go back and say a few words about the near impeachment (and eventual acquittal) of Justice Samuel Chase, the one Supreme Court Justice who, his accusers said, crossed the line into pure politics while serving as a judge.

Chase has been appointed to the Supreme Court by President George Washington in 1796. In Chase’s day, Supreme Court Justices also sat as trial judges. The charge was that Chase was unable to abandon his political partisanship. He belonged to the Federalist Party (who stood for a strong central government) and in the presidential election between John Adams and Thomas Jefferson, Chase favored the re-election of Adams. While serving as a
Justice, Chase was found to have been speaking to political gatherings on behalf of Adams’s candidacy. He was also charged, while sitting as a trial judge, with making very biased and erroneous rulings in the case of a man who was on trial for publishing a pamphlet criticizing the Adams administration in violation of the Sedition Act of 1798.

When Jefferson was elected President in 1800 and the Federalists were ousted from national office, Jefferson went after Chase. In 1803 Chase gave a charge to a grand jury in which he attacked the new State Constitution of Maryland because it established the right to vote for all adult (white) males, which Chase felt would result in rule of the mob.

The House of Representatives voted several articles of impeachment against Chase in 1804, on a close split vote, but the Senate eventually acquitted Chase of all articles of impeachment brought against him.

The “overwhelming verdict of history,” according to former Chief Justice William Rehnquist, has been that, despite Chase’s intemperate and partisan language both on and off the bench, the Senate was right to acquit him. Many saw the impeachment proceeding as an assault upon the entire Judiciary. According to Chief Justice Rehnquist, the importance of the acquittal of Justice Chase is that it tended to preserve the independence of the individual, and has resulted in a very narrow view of Congress’s power of impeachment since then.

I would add that since then American judges have clearly understood that they absolutely must stay away from partisan politics and, indeed, the federal and state codes of ethics for judges have established this as an express primary prohibition.
One hears, periodically, calls for impeachment of members of the Court. When I was in college and law school, there were always signs saying “Impeach Earl Warren,” the Chief Justice who led the Court to end racial desegregation in schools and open public accommodations to all races, who sought to end prayer in the public schools, expanded rights for criminal defendants, and to more equitable voting rights for all citizens. Even today there have been calls for impeachment of justices, as the five conservative members of the Court consistently outvote their four more centrist or liberal colleagues on a number of issues, including upholding extensive gun rights under the Second Amendment to the Bill of Rights, the finding that corporations are “persons” and therefore not subject to spending limits in elections, and now – as may well occur – that the Obama health care legislation will be held unconstitutional.

But it can safely be said that, while some members of the Court may be reviled, they will not be impeached or otherwise subjected to realistic attempts to remove them from office. Conservative Presidents popularly elected – Ronald Reagan, George Bush, the father and George Bush, the son – put these men on the Court and there they will stay – for life, unless they voluntarily choose to resign sooner.

It is hard to challenge this manner of accession. Understandably Presidents with a particular philosophy about the law are apt to pick like-minded Supreme Court Justices. This has been true of conservative Justices Scalia, Kennedy, Thomas, Alito and Chief Justice Roberts picked by conservative Republican presidents. President Obama, a former Professor
of Constitutional Law, has his own judicial philosophy and has appointed two Justices whose more liberal views largely track his own.

Presidential candidates in the past – John Kerry in particular, in his race against George Bush the Son (“W”) – was frequently quoted during his campaign as warning, “The Supreme Court. That’s why you have to vote for me.”

It did not persuade enough voters. But, quite possibly, as the impact of recent decisions by the majority of the Court are felt in coming years, the plea of candidates like John Kerry will have greater, perhaps even decisive, appeal to the American electorate. Only time, of course, will tell.