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Introduction: Globalization of Administrative and Regulatory Practice

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GLOBAL ADMINISTRATIVE LAW SYMPOSIUM

INTRODUCTION: GLOBALIZATION OF ADMINISTRATIVE AND REGULATORY PRACTICE

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Conceding the undeniable advantages of free trade, U.S. lawyers must be alert and prepared to deal with the formative stage of the trade movement or find themselves uncomfortable with the legal regime which increasingly insinuates itself into their practice. This symposium provides a few examples of how the free trade movement has expanded, and will continue to expand, into a broad range of national policy. These examples demonstrate that U.S. lawyers *outside those in trade specialties* must be sensitive to the sweeping impact of the global trade regime and become active players in every aspect of the shift to that regime, from the founding negotiations to the "legislative" and "judicial" processes, whereby supranational institutions will extend global law and regulation. Economic globalization requires "legal globalization."

Most practitioners now understand that full service often demands attention to relevant international trade and business components, although they might not be aware of how pervasive and powerful those have become. However, commitment to a global trade regime also affects our legal culture in another, less apparent, way. Practitioners must begin to contemplate how participation in the global trade regime will affect the development of our own law. Anne-Marie Slaughter, for example, observed the growing "judicial comity" among courts throughout the world.[1] She sees this

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1. *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1112 (2000) (stating, "[t]he global economy creates increasingly global litigation.").

movement as one of dialogue in which judges "communicate directly with one another with or without international treaty or guidelines to ensure a cooperative and efficient distribution of assets."[2]

All U.S. lawyers then must recognize that the factors influencing their practice reach beyond the boundaries of our legal culture. In short, learning about other legal cultures is no longer just fun but is becoming essential to the effective practice of law. The demand for a global approach to the law will affect every participant in our legal culture. Justice Breyer has challenged the legal academics to assist. He observed, "the academic job of investigating, learning, comparing, systematically explaining, and evaluating complements the tasks of those who work in government, including judges."[3] A joint push then by the legal scholars and practitioners is essential.[4]

The need for this push is intensified by the isolation of the U.S. legal community. Despite increasing attention by many U.S. lawyers and legal academics to other legal cultures, the U.S. legal profession is unfortunately at a considerable disadvantage. For generations, lawyers from Europe and other legal cultures have studied our law and legal institutions, many *in situ*. Much fewer of our lawyers and even legal academics have studied other legal cultures, at least in the same depth. The net benefit of globalization for the United States depends on how quickly our lawyers can catch up.

Administrative and regulatory practitioners and commentators are the best equipped to provide leadership for this push. U.S. administrative law has traditionally incorporated alternative constitutional and governmental principles. Until the last decade or so, administrative law was aggressively eclectic. The largely written procedures of the French administrative court, the *Conseil d'Etat*, have been consistently used to support written procedures in U.S. law.[5] The separate administrative courts prevalent in continental Europe have always added plausibility to the debate over their use in this country. Indeed, the formative stages of administrative law are filled with references to other systems.[6] The first U.S. administrative law

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2. *Id.* at 1114.

3. Stephen Breyer, *Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045, 1061 (2000).

4. *See, e.g.*, Alfred C. Aman, Jr., *Introduction: Globalization, Accountability, and the Future of Administrative Law*, 8 IND. J. GLOBAL LEGAL STUD. 341 (2001) (remarking on importance of participation by both legal practitioners and scholars).

5. *See* CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY § 7.3.3(a) (1990) (explaining history and function of the *Conseil d'Etat*).

6. *See* FELIX FRANKFURTER & J. FORRESTER DAVISON, CASES AND MATERIALS ON ADMINISTRATIVE LAW 12, 167 (1935) (illustrating effect of other countries' administrative

scholar, Frank Goodnow, explored U.S. administrative law in comparison to that of England, France, and Germany.[7] It is not surprising that a jurist particularly sensitive to administrative law, such as Justice Breyer, has been among the strongest advocates for careful attention to the globalization of our legal culture.

Because administrative law has always dealt with a vast array of diverse systems, it can easily focus its experience and expertise on the emerging law regarding global governments. In order to focus attention on some of these issues, the American Bar Association Section on Administrative Law and Regulatory Practice sponsored a panel at its Spring 2001 Meeting raising, before an audience of administrative law practitioners and scholars, some of the problems globalization is presenting for the U.S. legal community. The following articles by members of that panel offer samples of the regulatory and judicial review implications of the globalization.

Eleanor Kinney surveys the various regulatory and rights organizations, both governmental and nongovernmental, forming "transgovernmental networks."[8] Because of this development, a relatively new body of international administrative law has evolved. She asserts that "administrative law has much to offer international governance in designing transparent, accessible, and thereby accountable, procedures to guide the work of international bodies engaged in international regulatory programs."[9] This universe of global organizations and transgovernmental networks has increasingly globalized consideration of economic and social matters. Global administrative law affects all nations and all the peoples of the world increasingly being brought within complex systems of international governance. Of particular interest to the legal community is the array of international courts and tribunals and their relations to both international governance institutions and to national participants in the global community. Therefore, increasingly the U.S. legal community must confront the legal effects of transgovenmental networks in which the various governmental and nongovernmental institutions operate.

Professor Kinney sets out the various challenges for international administrative law. These challenges revolve around solving the "democracy problem" presented by global government. She observes that "a nearly

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law systems on the U.S. administrative law system); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 2-4 (1938).

7. *See* FRANK J. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW: AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY (1903) (demonstrating his early scholarship in the field of administrative law).

8. *See generally* Eleanor D. Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, 54 ADMIN. L. REV. 415 (2002).

9. *Id.* at 417.

universal perception [exists] that these organizations and networks are inaccessible and unaccountable to ordinary people, although not necessarily to international corporations whose interests they often appear to promote and service."[10] Yet, these international bodies cannot solve the democracy problems of transparency, accountability, and participation in the same way as national governments. Administrative law has much to offer in designing bureaucracies that serve these values with due consideration for costs, effective operation, and cultural diversity. Professor Kinney sets out an agenda for bringing to bear administrative law principles and experience.

Sidney Shapiro analyzes the effect of U.S. participation in global accords on international administrative process.[11] He warns:

> Despite the public's stake in these issues, the government can make important decisions concerning the enforcement of international standards in the United States without effective public participation. This frustration of public accountability is easy to miss because the interrelationship between the creation of an international standard and its adoption in the United States is subtle and complicated.[12]

Professor Shapiro identifies three major policy categories in which the free trade regime will subvert the basic administrative law values of public participation, accountability, and transparency. Perhaps the most conscious is "harmonization" in which U.S. agencies modify their regulatory decisions in compliance with transnational agreements. Through this process, the government negotiates policy changes behind closed doors. Less conscious but no less threatening to these process values is compliance with World Trade Organization (WTO) orders. Our agreement to transnational enforcement of the trade regime in the Uruguay Round of General Agreement of Tariffs and Trade (GATT) promised revision of U.S. regulations that the WTO adjudicative process determines constituted an obstacle to the global market. Professor Shapiro observes the likelihood that U.S. environmental, health, or safety policies will be subverted in the free trade regime. "Equivalency" is the third area Professor Shapiro sees undermining the goals of U.S. regulatory policy. Although perhaps less intrusive than the other two, equivalency nonetheless circumvents U.S. policy by accepting compliance with foreign standards as compliance with U.S. regulatory requirements.

Included in this symposium is a Article that was not presented at the Spring Meeting. In that Article, Malcolm Russell-Einhorn, Jeffrey Lubbers, and Vedat Milor use Latvia to discuss the adaptability of U.S. admin-

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10. *Id.* at 427.

11. *See* Sidney Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, 54 ADMIN. L. REV. 435 (2002) (analyzing U.S. effect).

12. *Id.* at 436.

istrative law principles to transitional democracies.[13] Transitional governments generally adopt parliamentary systems and hence "embrace a formal framework for bureaucratic control that favors legislative oversight supplemented by substantive judicial review in individual cases."[14] U.S. administrative law focuses on pre-decisional process rather than relying solely on post-decisional legislative or judicial monitoring. Moreover, the common law system generally looks more to process than the continental system adopted by many transitional legal cultures.[15] Naturally then, application of U.S. administrative law principles will focus on reforms built around values such as participation and transparency. This Article demonstrates how those U.S. administrative law values might be adapted to the needs of transitional democracies.

My Article explores the growing "Global Federalism," in which the trade regime implemented by the WTO will shift sovereignty from national to the supranational government.[16] It looks to the European Union's (E.U.) evolution toward an "ever closer union" to describe how judicial enforcement of a trade regime necessarily reaches into nearly every aspect of national policy. The European Court of Justice (the E.U.'s highest court) has been active in monitoring member state policies. It has invalidated member health, safety, employment, environmental, and other social policies if they inhibit the formation of a "single market," even if they are not discriminatory. As the E.U. has experienced a reasonably rapid shift of sovereignty from the member states to the supranational government, so the same evolutionary process may be predicted in the global community. Indeed, such a shift has, to some extent, already taken place. Based on this experience, much like our own earlier centralization, I assert that "[t]he free trade movement is part of a general and irresistible movement toward a global community."[17]

This trend includes the shift of law making authority from the national courts to the supranational tribunals. Just as the E.U. court has cooped the national courts in a number of areas, so the law developed by ever strengthening global tribunals can be expected to dominate some areas of national law, including national court decisions. I predict that the princi-

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13. *See* Malcolm Russell-Einhorn, Jeffrey Lubbers & Vedat Milor, *Strengthening Access to Information and Public Participation in Transition Countries—Latvia as a Case Study in Administrative Law Reform*, 54 ADMIN. L. REV. 459 (2002) (discussing adaptability of U.S. administrative law principles to transitional democracies).

14. *Id.* at 463.

15. *See id.* at 483 ("[J]udicial review tends to focus less on whether the correct procedures were followed, and more on the appropriateness of the substantive outcome.").

16. *See* Charles H. Koch, Jr., *Judicial Review and Global Federalism*, 54 ADMIN. L. REV. 491 (2002) (explaining shifting sovereignty in trade regime).

17. *Id.* at 492.

ples employed in this global review will be derived from the legal principles of the E.U., representing the continental legal cultures, and the United States, representing the common law legal cultures, currently the two dominant, largely world-wide, legal systems. (Much as German and French law formed the foundation for E.U. law.) This emerging global law will affect U.S. law directly and, as has been the E.U. experience, will migrate into internal U.S. national law.

Therefore, it is important to reiterate the overarching message of this symposium. Understanding of the law of other legal cultures has become essential to the practice of law *in the United States*. Administrative law, because at least during its formative years it has been instinctively eclectic and comparative, can provide leadership in the U.S. legal community's understanding of, and participation in, globalization.