Organization for Competitive Markets. **St Louis MO 8.8.09**
Banquet Address

The Role of Courts In Assuring Market Competition

David A Domina

Introduction

Thank you, President Randy Stevenson and OCM, for the opportunity to join you tonight. My responsibility tonight is to talk about courts. Specifically, are courts fair to farmers? To begin, it is appropriate, I think, to recall the words of one of history's most famous judges. This judge published an opinion of sorts about 3,500 years ago; an opinion in which he commented not on the resolution of litigation, but on the conduct of people.

The judge was Solomon. He wrote in Proverbs 30:24-28, "Four things on the earth are very small and exceedingly wise." Later, we will deal with each of these four items, but for now may I note one of them, "The locusts have no kings, yet they all march in rank."

Today, the Organization for Competitive Markets, a group committed to promoting, and encouraging competition in markets used by the producers of America's food supply to acquire seed, crop inputs and implements, and to sell products. OCM wants those markets to be vibrant and competitive. OCM is committed to making markets used by farmers competitive because OCM understands that the security of the food supply and the market at which it trade must be vibrant, competitive, broadly held, not concentrated, well regulated, and healthy, as a matter of national security.

So tonight our question is what about courts and the role of courts in competitive markets affecting the production of food? Appropriately, and generally, this focus must be on the antitrust laws of the United States.

Today, a remarkable thing happened at the OCM annual convention. The First Deputy Assistant Attorney General of the United States for Antitrust, four steps removed from the President, Attorney General, Assistant Attorney General, Antitrust First Deputy – came here to St. Louis to the OCM annual meeting to make his first speech in public office. The subject: examination of ag markets for fairness and competitiveness. What a remarkable achievement for the Organization for Competitive Markets. Thousands of people giving thousands of uncompensated days finally culminated today in the announcement made by Phil Weiser of DOJ.

But there is more. After Mr. Weiser spoke, we heard from an OCM founding member now serving as the chief regulatory official for the Grain Inspection, Packers and Stockyards Administration of the United States. Just a few years ago when at this group's annual meeting only a handful of people attended, I remember Dudley Butler addressing the group. Dudley talked about problems in markets affecting poultry production in the South, and I joined with comments about anticompetitive markets for cattle and hog producers in the upper Midwest. Now, Mr. Butler is responsible for enforcement of the *Packers and Stockyards Act* and oversight of the Grain Inspection Service. He is a regulator of market competition committed to these

issues as we are and representing a remarkable departure from past thinking that markets need not be regulated because big business, competing as one huge giant against another, would provide regulation enough.

Well, we know better than that now. At the enormous expense to our country of what has happened in the financial markets, we know that giants do not self-regulate; they simply gorge to excess side-by-side on smaller prey.

We celebrate today the fact that we may, for the first time, have people in power who understand our point-of-view on competitive markets and are willing to help.

But, surely we cannot see our philosophy of competition, and our view of how the American economy will work best – by being fair to the little person and by assuring that power is not imbalanced against the family businessperson – farmer, small manufacturer, independent grocer – as has so clearly been the case in the past.

As Solomon observed, locusts are small, but exceedingly wise. Without a king, they all march in rank. We must remember the last election was 53%/47%. And the party that prevailed in the election did not do so because 53 percent of the American public agreed on the question of competition. In fact, I doubt 27 percent of the American population had an opinion on competition, and perhaps fewer saw it as an issue at all.

Instead, it took more than half of us forming a coalition – marching in rank – and putting aside our differences over issues we cannot resolve. To this extent, as a coalition without a king, we could combine to make an electoral change. And, Yes we did!

Courts are Intended To Be Immune from Politics

The courts are intended to be immune from such a change. And from politics.

So, what are the courts and the role of courts in this process? Well, let us start with what they are, how they work and understand the mystery of the appellate judicial process. It is fitting, I think, to start with why and how courts are so often and intensively and easily attacked.

You know, a court does not pronounce a judgment ith a press conference. Very few appellate court judgments are pronounced orally at all. They come in opinion form, in writing. Even in the United States Supreme Court, where opinions can be paraphrased by justices and announced from the bench, it does not happen often. So, the judiciary is easy prey for the executive and legislative branches and for public interest groups with disaffective messages. Judges cannot talk back when criticized. They are largely barred by a code of judicial conduct requiring them to stay above the political prey, largely prevented from defending their institutions or themselves from attack. Even in states where judges are elected, horrible things said against them can be responded to with a little retort. Crossing the responsive line can lead to discipline against a judge resulting in removal from office.

In the federal system where judges are appointed for life, removal is not so much a threat, but harsh peer discipline is. The federal judiciary is worth a few moments of reflection. Nine justices of the Supreme Court, perhaps 225 judges of the appellate courts and maybe 600 to 650 trial court judges, Article III judges appointed by the President; that is the federal judiciary, all of it. It is small, focused, closely knit. Yes, its members are often appointed for ideology in the beginning, but once in office, often overwhelmed with administrative matters.

Courts Have Limits

Courts have significant limits regulating tightly what judges can do. Think about it. The jurisdiction of courts is given by a constitution or the legislature, not defined by the courts within jurisdiction where cases can be tried, controlled by venue statutes saying where cases within a court's statewide or nationwide jurisdiction can be brought and within a venue.

In most courts, cases are assigned by a computer operated with a table of random numbers so even on a particular court, a judge cannot pick or choose which cases he or she will hear. Judges cannot request that cases be filed with them. They cannot set the judicial agenda. Judges are governed by the principle of *stare decisis* about which we heard so much during recent U.S. Supreme Court confirmation hearings for Justice Sonia Sotomayor. And, with the exception of the highest court in the United States and each state, judges are subject to appellate review. These are significant constraints on their decision-making process.

So, courts have limits. Each of these limits is designed to help ensure fairness, prevent bias, assure objectivity, and prevent the politicalization of the judiciary. What is the agenda for a judge? Recently I had an opportunity to serve as a model appellate advocate; that is what we were called. It meant another lawyer and I were selected as guinea pigs for the American Bar Association convention's recent Appellate Practice Institute. The institute is attended largely by appellate court judges. And, as you can imagine, spending a weekend with appellate court judges can expose one pretty well to the agenda and their concerns.

You know, in the course of the two-and-a-half days I spent with that host of appellate judges from across the country, I learned their agenda, I heard the common denominator about what they discussed: docket control, case movement, progression schedules, rules, procedure rules, how many pages or characters in length to allow for briefs, should we allow 14 point font or should we let the lawyers use 12, who should prepare the record on appeal, a court report or the lawyers and should we require that both sides collaborate on a joint record?

These were the issues. Not once in a two-and-a-half days did I hear any judge raise any substantive issue about the question of public policy. Not even the federal sentencing guidelines came up; something with which they work and over which they anguish at all levels of the courts where the Federal Government and the states have adopted mandatory sentencing protocol since the inception of those mandatory protocol.

And how do courts work, especially appellate courts? Somehow the record reaches the appellate court and it consists almost entirely of black characters on white paper, occasionally a picture.

The appellate record with the briefs is nearly all the exposure the appellate court has; an oral argument 10 to maybe 30 minutes, but beyond that it is all in the written briefs.

So there is not much about courts that has to do with a political agenda. Yes, in those rare instances where a court is called upon to make policy, the political attitudes, or social and world view, of the judge can make a difference. But this is human nature and is to be expected.

When Must Courts Make Public Policy?

By design, courts were not built to make public policy. And, they rarely do unless the policy issue is a narrow one involving the interpretation of a statute or at the federal constitutional level for the most part, the interpretation of the Constitution. In other areas where courts must make policy decisions, they do so because the Executive Branch failed to regulate or the Legislative Branch failed to act.

For the most part, judges are ill suited by training or habit to assess broader perspectives from a policy standpoint. For example, if courts must make policy decisions about stricter environmental controls by deciding cases one by one between citizens, how likely is it that courts will have evidence before them with which to assess the risk that stricter environmental controls will push more and more production of modern life like biofuels, lumber, crops, deeper into the rainforests of Brazil?

So why don't the Executive and Legislative Branches make our social decisions instead of defaulting them to the courts? Is it because we do not insist they do so and do we fail to insist they do so because we, as people, do not observe the small things in life that make so much difference?

Let us return to Solomon's opinion in Proverbs 30. I mentioned that Solomon observed four small things on the earth that are each exceedingly wise. Specifically, he wrote:

> "There are four things upon the earth that are small but exceedingly wise.
>
> The ants are not a mighty people, yet they make all their food in the summer.
>
> The badger is not a strong nation, yet it makes its home in the rocks.
>
> The locusts have no king, yet they all march in ranks.
>
> The lizard can be caught in the hand, yet it is found in the palace of the King."

We don't want our courts to make our social decisions. We don't want our courts to "enforce" our antitrust laws. "Enforcement" is the responsibility of the Executive Branch of government –

through law enforcement. Courts provide places where enforcement disputes can be adjudicated. And we don't want the courts to decide our public policy questions in the antitrust area. We want the judicial role to be limited to adjudication of disputes about whether a company or citizen is, or is not, an antitrust violator and should, or should not, be compelled to pay damages or serve time s for antitrust crimes. These are the functions of courts, not making policy.

So why doesn't this happen?

We bash our courts, but cannot get together before our policymaking groups to share commonality. Instead, we allow ourselves as Americans to be divided over issues through litmus test journalism, or party membership, or even candidate identification. We are bound thoughtlessly in traditions, thinking we are this, or we are that, without either asking why, or what it means, or whether with a group with whom we think we should identify because those before us did, that group has changed and no longer represents what it did to our predecessor.

So we must understand the courts, expect to use them, recognize their judicial agenda, perceive how they perform their work, ignore the idea that the biggest is the best or the most expensive is the most effective as one approaches the courts. We must use them on merit, recognizing that it takes proof to win.

What Shall We Do?

What shall we do? Well, if we expect to have an influence on the judicial process, we have three essential available avenues:

> We can help identify, encourage, and to the extent we can be of assistance, even protect, witnesses who are reluctant to testify against large corporate interests for fear they will be put out of business. This is a commonplace problem for people in agriculture.
>
> Second, we can support, encourage, and even write where appropriate, articles for submission to peer review publications. Those articles can support, empirically with econometrics, or science or mathematics, or jurisprudentially with the law, or in other recognized disciplinary academic or intellectual ways, the shortcomings and flaws of research promoted, supported and published by large corporate interests whose goal it is to clog the journals with data supporting what the company wants to do, and not how people behave, the economy works, or science occurs.
>
> Third, we can bring cases to court, or support those in court, where it is intelligent, thoughtful, and appropriate to do so. When we do, we must be wise stewards of our resources, remembering the lesson of the ants who, though they are not a strong family, put up all their food in the summer. Surely Solomon was telling us work and make hay when the sun shines, but don't use it all up in November.

As we approach questions like: Shall we support an *amicus curiae* brief in this case? Shall we recruit others who can assist to finance a study germane to a case? Can we talk some of the lawyers sympathetic to us into helping out with a piece, or the lead, in a case filed by someone

else where the other party is receptive, and perceives a need for help? These are contributions that those interested in competitive markets can make.

We Must be an Organization

But, that is not all. Three of Solomon's four examples of small, wise things triumphed through discipline and organization. The ants, as a hill, made their food. The badgers, as a family, established their homes in the rocks. The locusts, without a king, all march in rows.

We are the *Organization* for competitive markets. Alliances, relationships, support on common issues, and, where appropriate, refraining to take issue on secondary questions less important, or not central to our mission, are fundamental to our success.

We must be organized, think organized, and get organized. These things could make a difference in court. Certainly they *will* make a difference when dealing with the development of new regulations by GIPSA, or the gathering of evidence by the U.S. Department of Justice, or making a thoughtful presentation in court.

Finally, we must bring cases to court that have a genuine chance to win. And we must recruit them. Think about the things that courts are called upon to decide – often because the Executive or the Legislative Branch does not want to deal with a political question that presents no real justiciable issue for a judge. Why should a judge decide if two people in love with one another can or cannot marry if they share a common gender? What makes this social question a judicial one – other than that the Executive and the Legislative Branches will not decide?

Consider Abortion. Setting aside the merits of the debate, and thinking of the question of abortion in pure debate terms, isn't it completely clear that the abortion issue is a perfect stalemate? Each side has a premise from which it proceeds. Each considers its premise correct. The debate is about the correctness of the premise.

And the answer turns on faith, not proof. This does not make a justiciable question for courts to decide. A decision must be made. Society must live with it. The decision belongs in the lawmaking branch. Sometimes the people make the law by initiative or referendum. But when they do, their function is legislative, not adjudicative.

We cannot expect our courts to maintain their respect, and continue their functionality without being drawn into the political debate in a way that defeats them because they cannot fight back, unless we withdraw from their domain these kinds of imponderable questions.

So what are we to do?

Can't We Learn

Can't we learn the lessons of Solomon's four things on the earth that are small but exceedingly wise? Can't we put up our food in the summer and do it collectively as a group, each of us performing a small part to make the food market work? Where we need help, can't we get it by

being organized in our approach to the Legislature, state or federal, and to the Executive Branch in its rulemaking and enforcement policies?

When we choose our home can't we be as smart as the badger and build them in the rock? Can't we be certain that we protect our investment, rebuild our infrastructure, keep ourselves strong with good decisions made as a society about where and how we deploy our funds for infrastructure so we do not pour countless measures of our wealth into the low land that will only wash away time after time predictably to prevent us from securing even more fully, like the badger, our houses in the rocks?

Can't we, without a king, be organized enough about common goals so that like the locust, on key issues, not just issues that threaten us when an enemy attacks, but issues that threaten us if we neglect them benignly, go to our common security?

And can't we learn from Solomon's wise selection for his fourth small thing from the lizard? There is evidence that Solomon liked lizards no better than we do. In his writings, the lizard was a reviled animal, not good for food, serving no particularly useful purpose that wasn't served by others less offensive. Solomon knew the lizard can be captured and it can be excluded from the houses and homes of the people. But despite humankind's ability to deal with the lizard, "it is found in the palace of the King."

Can't we combine, as a common goal over a common element of behavior, with a common objective, to keep the lizard from the palace and from the home, and to its range outside the intimacies of our lives or the essential machinery of our government to its less destructive range?

We must emphasize OCM's name's first word – organization – we cannot expect that, without sacrificing some of what we would prefer for all of what we need that we can prevail on core issues of primary importance to us.

So, our task is to learn from Solomon's examples. Study his positions. Understand his illustrations, and organize to make our markets competitive. It's an issue of national security.

Tonight, putting aside what divides us, and rallying to what we share with others is our calling. We are Americans… in one America. We are not different kinds of Americans in different Americas. And, we can restore, and invigorate our markets, and out Country, if, like the locusts without a king, on the common themes we share, we will all march in rank.

So, let us begin! Thank you.

David A Domina
Domina Law Group pc llo
2425 S 144th St.
Omaha NE 68144 3267
402 493 4100 ddomina@dominalaw.com