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University of Richmond

Panel Global Issues and the Rule of Law

Dr. William Cooper, President
University of Richmond
Tim Sullivan, Co-Chair, President Emeritus

Dean Rod Smolla
Justice Donald Lemons, Moderator

Panelists:

American Inns of Court

1. Honorable J. Harvey Wilkinson, III
Judge and Former Judge of the U.S. Court of Appeals, Fourth Circuit
2. Honorable Ruth McGregor, Chief Justice of Arizona
3. Honorable Deanell Tacha, Chief Justice, U.S. Court of Appeals, Tenth Circuit
4. Honorable Stephen G. Breyer, Associate Justice of the U.S. Supreme Court
5. Honorable Carl Stewart, US Court of Appeals, Fifth Circuit
6. Honorable Randy Holland, Supreme Court of Delaware

British Inns of Court

1. Right Honorable Lord Jonathan Mance, Appellate Committee of the House of Lords
2. Right Honorable Lord Nicolas Phillips of Worth Matravers, Lord Chief Justice of England and Wales
3. Right Honorable Lady Justice Mary Arden, Court of Appeals of England and Wales
4. Right Honorable Lord J. Bernard RIX, Court of Appeals of England and Wales

MODERATOR: Justice Donald Lemons: Welcome to the University of Virginia Law Conference.

This conference is the result of a number of years of planning. It is offered under the auspices of the Federal Jamestown 400th Commission, in the Democracy Conference Series. This conference is one of several university-based academic conferences that have been planned during the year of the Commemoration of the 400th Anniversary of the first permanent English settlement at Jamestown. We thank Frank Atkinson, chairman of the Federal Commission and all of the Commission members – some of whom are in the audience here this evening – for all the efforts you have given to this worthy project. There are a number of participating organizations that deserve recognition. I urge you to look into your program to see the references to them.

But I have to mention that the American Inns of Court and the four British Inns of Court have enjoyed a mutually productive relationship that has resulted in this event and many of the other events that you see in relationship to this commemoration. This relationship between the American Inns and the British Inns has been tangible evidence of good work and good will. Special thanks,

however, has to go to the University of Richmond for the sponsorship of this program. From the very beginning Dean Smolla and President Cooper have not only warmly received but enthusiastically embraced the idea of this conference and the location at this University.

Dr. William Cooper has served the University community, with distinction as its president since 1968. During his tenure, his creative and imaginative leadership has lead a student body and the faculty, known for its excellence into new and exciting academic ventures. The Richmond Quest Program, which some of you may very well be familiar with, has invited students and faculty and staff to submit provocative questions to the entire University community around which academic ventures and discussions will take place for an entire year. Additionally, his Common Ground Initiative has encouraged and celebrated diversity at this University. In a few months he will step down as the President of the University and will remain on the University faculty, and we are grateful to him for nine years of creative and visionary leadership. And we are grateful to his contributions for the tradition of excellence for which this University is known. Dr. Cooper.

Dr. William Cooper, President: Thank you very much, Justice Lemons. Distinguished guests, on behalf of the University of Richmond – our students, our faculty, our staff and our alumni, it is a special privilege to welcome you to our campus for this historic Rule of Law Conference today. This Conference provides the University, the greater Richmond region, and the Commonwealth of Virginia a truly rare opportunity. We have in our mist world renowned scholars and practitioners of the rule of law and they will explore together issues of timeless import, think creatively about solutions. The University of Richmond is well positioned to host these kinds of conversations. At our institutional core, commitments to ethical leadership, the pursuit of truth, and respect for multiple viewpoints. I offer special thanks to Dean Rod Smolla and his outstanding team for bringing this distinctive conference to our campus. The 400th Anniversary of the Founding of Jamestown compels us to reflect upon on the concepts of freedom, justice, difference and

resolution. I wish you all Godspeed on the dialogue to come on these topics during on your stay on this campus. Thank you very much. Now back to Justice Lemons.

MODERATOR LEMONS: My good friend Tim Sullivan continues his distinguished contribution to the citizens of the Commonwealth and his career in public service for the nation. Among the outstanding service that Tim has rendered: he has been the President of William and Mary College after a long tenure of professor there and dean. He was also a professor at the University Virginia School of Law. He served as a special assistant to Governor Charles Robb in the course of his work here for the citizens of the Commonwealth. Today he is the President and CEO of the Mariner's Museum in Newport News; but he is here today in another very important capacity. Tim Sullivan is the Chair of the Planning Council for the International Conference Series on the Foundations and Future of Democracies, sponsored by the Federal Jamestown 400th Commission. Please welcome President Emeritus of William and Mary, Tim Sullivan.

CO-CHAIR TIM SULLIVAN: Thank you very much, Justice Lemons. It has been a great honor for me to serve – and I continue to serve – as Chairman of the Planning Council of the International Conference Series on the Future and Foundations of Democracy. It is also my great honor to welcome all of you to this most remarkable gathering of distinguished jurists and lawyers, to engage in the examination of one of the critical issues of our time and that is the durability of the rule of law. This grand commemoration of America's 400th anniversary, of which the Democracy Conference Series is part, would not be possible without the dedication of volunteer leaders who serve on the Jamestown 400th Federal Commission and on the Commonwealth of Virginia's Jamestown 2007 Committee.

We have vested in all of these efforts from strong public support at the state, local and federal levels. But I also want to take a moment to recognize and thank for their extraordinary generosity our founding colony sponsors, whose major financial commitment made just about everything we

are doing possible. Those sponsors include: Norfolk Southern Corporation, the Colonial Williamsburg Foundation, and Verizon. We are grateful to all of these organizations.

Last year, Justice Sandra Day-O'Connor became National Honorary Chair of America's 400th Anniversary Commemoration. Justice O'Connor was unable to be with us today, and looking at the program she is probably the only distinguished jurist, in the Anglo-American legal world who isn't here, but she sends her best regards in any event. Our honorary leadership for the Conference Series includes for vice chairs: former Speaker of the U.S. House of Representatives and Ambassador to Japan, the Honorable Thomas Foley, and the former Attorney General of the United States William Barr. We are blessed to honorary co-chairs in the International Conference Series including: former Prime Minister of Great Britain Margaret Thatcher, the 44th President of the United States the Honorable George Bush, and the Honorable 42nd President of the United States Bill Clinton. We look forward to their involvement in the Conference Series in the forthcoming Year.

Beginning in August of 2006 and continuing through early September of 2007, we have been and will continue to explore the Foundations and The Future of Democracy at a series of conferences held mostly at Virginia universities, and bringing scholars and practitioners from around the world, who will help us try to understand the elements of democratic government and the critical issues facing emerging and mature democracies. The International Conference Series will end in Williamsburg on September 16 through 19th of this year, where we will conclude with a gathering of world leaders who will come together in our World Forum on Democracy to discuss issues to which I have already referred. Joining the 400th Federal Commission as host of the World Forum will be the College of William and Mary, The Colonial Williamsburg Foundation, and Virginia's Jamestown 2007 organization.

I have taken enough of your time. I hope the preliminaries are nearly over and we can get to the meat of this remarkable event, which is just about to begin. Thank you for giving me a chance

to welcome all of you to Richmond, to the Commonwealth of Virginia, and to this great country the United States of America. Thank you.

MODERATOR DEAN SMOLLA: President Cooper, thank you. President Sullivan, thank you; and Justice Lemons, thank you. Welcome to everyone. In 1946 President Harry Truman welcomed Sir Winston Churchill, at Westminster. Not Westminster in England College in Fulton, Missouri. Winston Churchill took that occasion to take what would come to be regarded as one of the great speeches of his extraordinary public life. It became known as the ‘sinews of peace speech,’ after one of the phases in that address, and I want to share with you a few of his words on that occasion Winston Churchill said:

‘But we must never cease to proclaim in fearless tones the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, the Habeas Corpus, trial by jury, and the English Common Law find their most famous expression in the American Declaration of Independence.

All this means that the people of any country have the right, and should have the power by constitutional action, by free unfettered elections, with secret ballot, to choose or change the character or form of government under which they dwell; that freedom of speech and thought should reign; that courts of justice, independent of the executive, unbiased by any party, should administer laws which have received the broad assent of large majorities or are consecrated by time and custom. Here are the title deeds of freedom which should lie in every cottage home. Here is the message of the British and American peoples to mankind. Let us preach what we practice - let us practice - what we preach.’

The next four days we have the privilege to have assembled here in the Commonwealth of Virginia an extraordinary array of speakers from throughout the world to explore the theme suggested by Winston Churchill, relating to the rule of law. We begin this afternoon with this august panel of jurists from the United States and the United Kingdom. Let me introduce them to you:

At the far right end of the stage, – though not of the ideological spectrum (laughter) – the Honorable **J. Harvey Wilkinson, III**, Judge and Formerly Chief Judge of the U.S. Court of Appeals, Fourth Circuit.

Next to Lord Wilkinson is the Right Honorable **Lord Jonathan Mance**, of the Appellate Committee of the House of Lords; which is for our American audience the equivalent in the United Kingdom of our Supreme Court.

Next to Lord Mance is the **Honorable Ruth McGregor**, Chief Justice of Arizona.

Next to Chief McGregor is the **Right Honorable Lord Nicolas Phillips** of Worth Matravers, Lord Chief Justice of England and Wales.

To my immediate right is the **Honorable Deanell Tacha**, Chief Judge of the United States Court of Appeals for the Tenth Circuit.

To my left is the Right **Honorable Lady Justice Mary Arden** of the Court of Appeals of England and Wales.

To Lady Justice Arden's left is the **Honorable Stephen Breyer**, Associate Justice of the Supreme Court of the United States.

Next to Justice Breyer is the Right **Honorable Lord J. Bernard Rix** of the Court of Appeal of England and Wales.

To his left is the **Honorable Carl Stewart** of the United States Court of Appeals for the Fifth Circuit.

At the far left of the stage – though I suppose it is fair to say also not of the ideological spectrum (laughter) – is the **Honorable Randy Holland**, Justice of the Supreme Court of Delaware.

This is an honorable assemblage to say the least. Won't you please join me in welcoming our guests? (Applause) We're going to begin our conversation by inviting each of jurists to spend a moment or two reflecting on the core meaning of the rule of law, and I think I might ask Lady Justice Arden to begin. When we hear the phrase 'rule of law,' it conjures up many different things too many different people, the United States, England, and around the world. I am interested in what you, Lady Justice Arden, and then the others, think of as jurists when you hear that phrase?

LADY JUSTICE ARDEN: Thank you, Dean Smolla, for the honor of starting the ball rolling. To my mind, the rule of law means simply that law rules. It is the state affairs in which the law rules. Apart from that no one has ever produce a comprehensive definition and I don't think they ever will; but I would like to use the metaphor of a tree trunk. Start with the tree trunk. The tree trunk is the **organizing principal** of the rule of law; namely, that the law rules, that everyone is equally subject to the law; the principal of equal subjection. Then you have some branches growing off this tree trunk. First, you have the branch of *access to justice* which means you must have an independent judiciary, you must have an independent profession of lawyers, and you must have effective access to judges, meaning in some appropriate cases legal aid. Another branch is *limited to government*; the government is subject to law also and so government must be limited. Then you have another branch *separation of powers*; the judges must be separate from the executive and from the legislative. And then you have another branch which is the *quality of law*; the law must be certain, it must not be irrational, and so on. Then lastly you have a branch which is the *relationship of rule of law to human rights* – such as Dean Smolla has referred to. The rule of law, as I see it, does not itself create rights, but if a right exists it is the rule of law which guarantees that the right can be enforced. Hence, we have property rights, the rights of due

process, and so on; unwritten constitutional norms. The core organizing principle, as I see it, is the principle of equal subjection to the law, the law rules. Dean Smolla, that is my perspective.

MODERATOR DEAN SMOLLA: Thank you, Lady Justice Arden. What the audience can't see but I can is that you have a tree trunk drawn on your notes (Laughter) Judge Tacha.

JUDGE TACHA: Well, as usual Lady Justice Arden has drawn the picture very effectively and maybe there is no need for any of the rest of us to talk. But I would like to put it into a little bit different context. What she has said is exactly what I think, except from the American perspective, of course, it is the rule of law *is* the written constitution, and very much the backbone or tree trunk, if you will, of how we look at the rule of law. I would like to challenge you to think about the splays of the rule of law in two dimensions: One dimension a procedural dimension, a framework dimension. The other one is a substantive one. Now, let me describe them; they fall into the branches of the tree trunk analogy quite well. Procedurally, I think it is fair to say that for an American judge like me, day in and day out, the rule of law means above all that I am answerable to the law and the law only. That is the cases, the Constitutions, the statutes, the regulation, and the set of facts before me; and we are very much bound by that set of facts. I cannot bring my personal judgment to bear; nor can I let any influence beyond the law influence what I do. So the procedural – and I call it procedural because it is how you do your business – is one of total independence, dependence on that independent bar, dependence on the courts around me, looking carefully at statutory language; trying to the best of my ability to look at that Constitution and determine its meaning.

I am reminded – in the last few months I have been studying the Virginia Charters – and so much of these principles come to us from the Virginia Charters – the substantive side is the side that is one of the branches that Lady Justice Arden talked about, and that is the substance of the law. There is not world coherence or even consistency on exactly what substance constitutes the rule of law. Around the globe we need, I think, to be very, very respectful of different traditions,

different histories, different constitutional schemes, different court systems, that the substance of the law is quite different. Of course, there are these unifying principles. Access to justice; you go to the emerging republics and an independent defense bar cries out for reality. But I think in the procedural side it is clear to us this independent bench and separation of powers, and for us in this town, I could not withhold reference to John Marshall, in *Marbury vs. Madison*, in the judicial review, that is on the procedural side. On the substantive side I think the world has a lot to learn about each other about what the rule of law means.

MODERATOR DEAN SMOLLA: Justice Breyer, thoughts? I think it is on already.

JUSTICE BREYER: Can you hear me? I am not very mechanical (Laughter) I would like to thank you for having the Conference, and for having us here. It promises to be a very interesting Conference and it is really a treat for me to see my English colleagues again. I do get to see them occasionally and it is always nice to see them; other American colleagues whom I see too from time to time. I am just pausing while I try to think this one out.

You have a group of judges and we all see pretty much alike. Ask a group of judges what the rule of law is judges immediately think of this very complicated system. It is complicated: it has rules, it has statutes, it has constitutions, it has procedural rules, it has judges' decisions, it has practices that lawyers take on that guide them and clients. It is a whole complicated system of rules; its rules are a vast oversimplification. But we do think of it in terms of rules sometimes. There is often lot of shading in it. But through all of that what does everything in that system have in common to the point where it isn't a system like that if it doesn't have certain minimal decisions. I am just going to repeat what others have said but I can think of four anyway.

First, I think *it has to be public*: That is, if people don't know what the rule is I'm not sure you want to count it as a rule. See, I used to teach administrative law so I love the Administrative Procedure Act – I'm the only that did. I thought one of the big advances in law in the United States and I have sometimes said this in third world countries and their representatives who wanted to

know what to do. So, I said, ‘Well, we have a simple rule. If you don’t publish it – and they didn’t in Communist Russia – it isn’t a law.’ Because people can’t find out what they are supposed to do or who does what. And then you have arbitrary rule.

The second characteristic, I think, just what I said, *it can’t be arbitrary*: That is a lot of distinctions made in these four billion laws. There are fourteen hundred trillion distinctions, but those distinctions that they make among people in situations have something to do with the purposes of the law. Once we get away from that – Imagine rules between rich and the poor. And you say ‘why do the poor people have to do it but the rich people don’t?’ Now if you can’t point to some reason for that people will think this is really unfair and it is hardly a law. And the same thing works in reverse. So the distinctions somehow have to be related to the purposes.

The third thing I wrote down is there is *some minimal condition*; not for perfect fairness and justice but it has to tend in that direction. That is, you go back some 10,000 years, I think, there is this cry for justice; ‘Justice, justice, shall you pursue,’ and that’s older than any of us – though I feel I am getting quite old (laughter) – and that reflects a natural human desire. And law is there, in part, to satisfy it. So there is a minimal relationship there. When you get the systems that are too unjust you begin to think they are hardly legal systems; there is something weird, Martian, we don’t recognize them.

And fourth, I put down and that was Mary Arden’s first point, *it has to really happen*. What has to really happen? It has to really happen that the people who are in charge of decision making in society do try to make those rules and follow them. And it has to really happen that the people who live under them follow them, even when they disagree. And that’s what the miracle of the rule of law is, which has taken a long time in the United States to get there. We’re not there totally yet, because we make a lot of wrong decisions in our court and I admit it.

And I have to admit that sometimes even when I am in dissent, maybe the majority is right, and vice versa (Laughter) So, we can make wrong decisions, but people will follow them even when

they are wrong and that's a rule of law in the strong sense, because that means that the country and the 300,000 million people in it have recognized that it's more valuable to have a system where they follow a law or a rule or a decision even when they think it is just terribly wrong then it is to just do what they want on the streets or wherever; to decide their disputes through bayonets or worse. That's the rule of law.

MODERATOR DEAN SMOLLA: Justice Phillips.

LORD CHIEF JUSTICE PHILLIPS: Thank you. It seems to me that there are two fundamentals of the rule of law. Firstly, **there must be law** and secondly **the law must be enforced**. What do we mean by law? We don't mean the law of the jungle; we don't mean the rule of the tyrant laid down and enforced for his advantage. We mean principles or rules which govern relations between citizens and between citizens and the states. So what are the sources of this law? Usually, I suggest they will be the democratic process, but it doesn't seem to me that this is necessarily so. I can't see why you shouldn't have a rule of law where the law has been laid down by a benevolent dictator. The other: enforcement. You must have, so it seems to me, an independent judiciary, objectively applying the law. The integrity of judiciary is essential to rule of law and you must have executive who will give affect to the ruling of the judiciary. You cannot have rule of law unless the executive believes in its importance of this and respects the independence of Judiciary.

And it is ultimately, I think, essential that **populace** also believes in rule of law and has confidence in the laws under which it is administered. How about the **content of law**? This, I think, is perhaps the most difficult area. Mary Arden said, 'Well, human rights are not a part of the content of the rule, it's something to which the rule of law applies.' I suspect that many of us who think that the rule of law must have a certain content if it is to be described as such. There are now international norms that are now recognized. Prohibition of torture; can you have a rule of law if torture is permitted, inhumane treatment. Absence of discrimination; is that essential to the rule of law? It is a very recent development in legal systems, absence of discrimination. Finally,

fundamental human rights; are they now to be considered an essential element of the rule of law or are they simply something to which the rule of law applies. I suspect we will be debating this a little later.

MODERATOR DEAN SMOLLA: Thank you, Lord Chief Justice. Lord Rix.

LORD RIX: (First part of sentence indistinguishable) studied the best of my law and some of it under Professor Breyer, as he then was. But what does it mean to say that ‘law rules’? It’s such a pithy phrase. First, there is an emphatic implied negative: the law rules, not man. So, it was Thomas Paine who said that law is king. Kings have given way to democratically elected governments and legislatures, but though they make the law, they remain subject to it; both in the process of lawmaking itself and in its application. In Britain Parliament and not a written constitution is sovereign, but parliament’s effective power is limited by law and the judges guard against abuse. Since the rule of law rules and not man the rule of law stands for *equality under law*, and I would stress that, and thus for dignity and autonomy of the human individual. The law that rules must be public, accessible, predictable, non-retrospective and non-arbitrary. There must be a system of courts or tribunals through which litigants have real access to justice. Law requires fair procedures. So much for the laws formal requirements; what might be called the legalism of the law.

Some commentators say that it also has substantive content and I would agree. It is not just that the rule of law requires legality, as well as legalism. It is that in a modern democratic state the law if it is to rule then must protect fundamental human rights and freedoms. A purely formal rule of law in a totalitarian state will offer little comfort. I return to the thought that the law rules. If the law is to rule then there is need of an impartial independent judiciary and of a system of appeals; that judges are men and women like any other, the rule of law is of law and not of judges.

And there must be a system of judicial review under which the courts hold governments accountable for illegal, irrational, or procedurally defective administrations. Another pithy phrase

is that ‘power corrupts.’ The rule of law is an antidote for the insidious corruption of power. In conclusion, I would praise to the rule of law for the demands it makes on rationality. It is a safeguard against lack of reason. By promoting rationality, it promotes the dignity of man. But the rule of law is not the only good in town and it will ultimately be barren without wisdom and courage.

MODERATOR DEAN SMOLLA: Thank you, Lord Rix. Chief Justice McGregor.

CHIEF JUSTICE MCGREGOR: Thank you. We knew that we would be asked at the first part of this panel to talk with you about the factors that we see as forming the core of the notion of the rule of law. And so in thinking about that, I considered a number of the factors that you have heard here today: predictability, stability, impartiality, transparency and fairness in procedure. But I found that my thoughts kept returning to a consideration of how much we depend on our citizens relying upon their own notions of morality, and upon our culture and traditions, to actually follow the law. If it were not for that acceptance by our citizens, then all the procedures we could establish would be completely ineffective to maintain the rule of law. So, that led to my next question which was, ‘what do non-lawyers, and non-judges, and non-college professors mean when they hear us refer to the rule of law and ask them to help us support the rule of law and continue it. Why is it that our citizens, non-law-trained citizens, accept the rule of law? So, to answer this, I did a completely non scientific survey, and I asked those non-law trained persons within our court system what does the rule of law mean to you. I also, incidentally, asked the lawyers and judges and as Justice Breyer mentioned, there were very complex and complicated answers that I got from them. But I asked it also of the non-law trained. And the responses from those people were striking to me in their agreement, because this is what they told me. The rule of law, they consistently said, means we are governed by law and that no one is above the law.

I suspect that basic statement really encompasses a lot of the factors that we are talking about today. And I intend, at least, to keep it in mind when I talk to our public citizens about the rule of law, and ask them to help us maintain the rule of law as we have known it.

MODERATOR DEAN SMOLLA: Chief Justice, thank you. Judge Steward.

JUSTICE STEWARD: I suppose if this were an examination where you check the box that says all of the above (Laughter) It would be difficult to disagree with anything anyone has said, and hopefully the statements by everyone suggests just how broad a concept the rule of law is, and in many respects it is a matter perspective of where you come at it. I think that at the bottom it's a societal safeguard against arbitrary governance. I think that from the citizen's standpoint, it is a construct that breathes confidence in people to believe that there are a set of norms that have been established for the society as a whole, and that those principles have overriding force beyond the individuals or persons who are in particular positions of power. I think that the rule of law has to be viewed from the perspective of the bottom up rather than top down if it is to have meaning at all, either procedurally or substantively. It certainly means that there is to be equal access to the justice system, which is not to be confused with equal outcomes.

One of the principles that as trial judges when I was one you wanted people to leave your courtroom at least feeling that they had a fair shake. They may disagree with the result but you always want people to feel they had a fair shake and equal access to the courts. And so I think very much the rule of law connotes this notion that there are a set of principles or norms that serve as a source of the law that gives citizens confidence that these norms govern society, as has been mentioned, whether they agree with them or not. I also think that the stability and predictability of the rule of law allows ordinary citizens to govern their lives by.

We sort of keep score on the number of cases that are filed and how many people come through our system, but we don't have a way of counting the number of people who don't file suits and who don't come through our system. And that is because they are able to make decisions about

their lives and order their businesses based on predictability and concreteness of the rule of law. I think that distinguishes us from other societies where there is no rule or law, where it is purely arbitrary.

So, to a large extent, whether we look at procedural or substantive, I think the stability and predictability come in. One aspect of it that hasn't been mentioned and I'll just say, often in these definitions the role of precedence is heavily mentioned as a factor in that. So, my perspective has changed. I grew up in Louisiana, which is the only state that has a civilian methodology and not a common law background. So, I grew up not worrying about precedent, only as a persuasive in terms of source of law. But obviously as a federal judge, I learned very much about precedent. So my perspective on the rule of law with precedent as an ingredient has evolved over my lifetime as a judge, coming at it from different perspectives and I suspect we may talk about precedence later.

MODERATOR DEAN SMOLLA: Thank you, Judge. Lord Mance. You don't have to turn it on.

LORD MANCE: Thank you. I am delighted to be here and thank the organizers of this event. I think the rule of law must mean different things in different context. First things first, in early societies the concern was to have some form of framework. In more sophisticated societies, in settled conditions such as happily the United Kingdom and the United States both enjoy, we have developed an increasingly sophisticated view of the rule of law. Curiously, it's one which takes us back to its Aristo-Athenian roots – that of natural justice prevailing over any arbitrary rule or law set by kings or princes. The more sophisticated view, therefore, has looked at some of the values which underlie the idea of a secure framework: values of certainty, consistency, quality, fairness, and extrapolates and extends them to fundamental human rights, generally. I think there are clearly limits.

I would, myself, I think accept that the rule of law – It's useful to talk in terms of the rule of law embracing certain fundamental human rights, but clearly it doesn't embrace all human rights. There are many socio-economic rights, including many constitutional rights which one wouldn't, I

think, easily, without straining words, embrace in the concept. I agree with much of everything that has been said.

Much of the core concept is clearly a society providing its citizens with a secure and fair basis for public and private conduct and relations. I think, again, one can see an extension there, in modern times, from national societies toward the international scene. It now makes sense to begin to talk, since the Second World War, of developing the idea of rule of law at the international level and one which international countries should respect. It means, therefore, the *core* concept, a society where power is exercised and private relations are governed by established laws capable of enforcement by an independent judiciary.

Of course, there are differences in the extent to which powers are subject to the rule of law. In the United States one can see with a written Constitution all powers are subject to judicial review. In the United Kingdom we have an intermediate position. I think it would be ridiculous to suggest that because we have a document of parliamentary supremacy there is no rule of law. That demonstrates I think that the rule of law doesn't cover all areas. It's not the be all and end all. We shouldn't attach to the law absolute or greater importance than it can bear. You need an attitude of respect for certain values for society to operate. In the United Kingdom, with imperfect judicial review, nonetheless, I think, through the operations of Parliament, through the control of public opinion and the press have operated in accordance with the rule of law; even though Parliament is ultimately supreme and it makes errors, at any rate, and unreviewable by the courts.

I would attach one additional quality to the rule of law to those which I think I have already mentioned. The concept of separation of powers, which has been mentioned, seems to me to imply recognition that certain powers are either inherently executive, or inherently legislative or inherently judicial; and the rule of law seems to me, to involve the proposition that no branch should trespass on the others' activities. And there are some good examples in United Kingdom litigation of that in the context of the Privy Council and adjudication upon constitutions of among

some of the commonwealth countries. In a case called **Lall Argy** in 1967, the Privy Council held that a law introducing adjudication by special courts in Sri Lanka was actually without a constitution. Last year in **Korati**, we held that a law that denied to the court any right to give bail pre-trial was itself contrary to a provision of the Constitution introducing the rule of law in Mauritius. I think those were in each case recognitions of certain functions are inherently judicial and it is contrary for the rule of law to impinge upon them whether by executive order or legislative action. Thank you very much.

MODERATOR DEAN SMOLLA: Thank you, Lord Mance. Justice Holland.

JUDGE HOLLAND: Thank you. It's a pleasure for me to be here. In thinking about the rule of law, it's hard for me not to think about it in a historical context, especially with our guests here and being here to celebrate the 400th Anniversary of Jamestown. When I think of the rule of law, I think that there are certain protections, liberties and rights that people in a civilized society have a right to expect, and they have a right to be protected. And in thinking about the rule of law, I couldn't help but think about how that's figured in our history, our joint history. We remember when the Magna Carta was signed in 1215. What the people were saying to King John is there are certain things that you can't violate, and we are going to write them down, and we're going to make sure you don't violate them again. And things went along pretty well but memories are short and; and overtime when it was thought they would found Jamestown Edward Sandys, a lawyer from the Middle Temple, wrote the Virginia Charter. And in the Virginia Charter said everyone settling in Virginia should be entitled to all the rights of the English people.

So they really transported the rule of law to the United States in the beginning in the Virginia Charter. And at the same time Edward Sandys was saying to James I, who was the king, 'you know just because the King changes and Parliament changes, you can't change the rights, the liberties, the protections of English citizens; you have to acknowledge them; which, as many of my colleagues have said, no one is above the law and the law has to be respected. We know that when

we had the problem with King George, III, that lead to the Declaration of Independence. If you read the Declaration of Independence, what we said is we have certain rights to be free from search and seizure, we have the rights of trial by jury, and you are not respecting our rights. You are not respecting the heritage that went back to the Magna Carta. And one of the biggest concerns was the King had tried to compromise the independence of the judiciary.

So, when I think of the rule of law, in addition to looking at its parameters, I think about its enforcement, and an independent judiciary is critical. In looking at the Delaware Constitution signed in 1776, the first thing Delaware said was the common law of England is now going to be the law of Delaware, and we're going to have an independent judiciary because that's the greatest safeguard of our liberties.

But the rule of law doesn't work simply by having a list of rights or having an independent judiciary available; it really needs the legal profession. In the context of thinking about our Anglo American heritage, I had to recall to what Shakespeare said in the phrase in Henry the VI, Part 2, where he said we should kill all the lawyers and we should burn down the Inns of Court. The reason he wanted to do that is because he wanted to promote tyranny. It was clear that if you wanted tyranny and you wanted to eliminate the rule of law, you had to eliminate the legal profession.

So when I think about the rule of law, I always think about the role not only of the judiciary but of the legal profession, because to me in the final analysis, the rule of law shapes the boundaries of those protections and liberties and it's those boundaries that keep us free. And we can't keep them free unless we have an independent bar, advocating preservation of those rights.

MODERATOR DEAN SMOLLA: Thanks, Justice Holland. Judge Wilkerson.

JUDGE WILKERSON: It's a great pleasure for me to be here. I wonder how many of you have been sitting in a meeting and at some point thought to yourself, 'gosh, everything has been said, just not everybody has said it (Laughter) The greatest round of Applause I ever received is when I

stood up in some meeting and said, 'I agree with each of the 32 speakers,' and sat down (Laughter)
I'll try not to repeat because so many good things have been said there is no need to repeat.

To me, the rule of law means a balance between two supreme values in our society: between liberty and order and it is important not to let balance get out of kilter. You want to maintain an exquisite balance between the demands of liberty and the demands of order, and if a society is successful in maintaining that then it will have achieved the best values of the rule of law. Even when you think – the whole idea is to avoid absolutes – even when something appears to be an absolute description of liberty it's mixed in with values of order.

The First Amendment appears to confer an absolute right to freedom of speech, but it has to be balanced with order; and you don't have a right under the First Amendment to so say anything you please, at any time you please, in any place you please and in whatever manner you please. The Fourth Amendment has the same thing. You have the liberty to do in your home a whole lot of different things, but, again, your liberty is not absolute. Law enforcement authorities may get a search warrant if they have probable cause and find out if you are obeying the law. So even in the description of the Bill of Rights there is this concern of keeping liberty and order in balance. Any society worthy of the name will want to respect those two things and keep them in equipoise.

The corollary value is everybody is subject to the rule of law. The question is what kind of attitude do we have when we execute the rule of law? I think we need to go about applying the rule of law in the spirit of humility and in a spirit of restraint. Most times the great abuses of law and the great abuses of authority have been through arrogance and high-handedness, and the rule of law has best been best exercised when people really approached it with the spirit of humility.

And that means one thing. It means staying within your proper role. Just as we respect a physician, or a minister, or a bus driver, a carpenter or a school teacher, we respect them most when they do the role they have chosen and society regards as useful. It is the same thing with judges, presidents and legislators; just as with bus drivers, preachers and teachers. When people

with authority stay within their assigned and constitutionally assigned roles we respect them the most. And when they start jumping the traces, kicking over the traces, and encroaching into other people's territories and trying to assume expertise that they do not have, and then the rule of law in the constitutional scheme is eroded.

The final point that I would make is that the Rule of law is not just the high and mighty. It's not just the President of the United States, or Speaker of the House, or Chief justice of the United States Supreme Court. The rule of law is carried out on the basis that affects you the most – is carried out by someone you don't know at the Division of Motor Vehicles (laughter) in charge of renewing your license. Since this is taxpayer season, the rule of law is carried out quite fundamentally by an agent of the Internal Revenue Service, and those are the people you really want to approach the law and their functions with humility.

What does that mean? It means putting yourself in somebody else's shoes. It means that Internal Revenue Agent puts himself in the place of the taxpayer. It means that that Division of Motor Vehicle clerk puts himself in the shoes of the motorist. It means that the judge steps outside himself and puts himself in the shoes of the litigant. And those in the bureaucracy and the government need to ask what does the consumer expect from us; not necessarily for a certain outcome, but they expect respect, efficiency, promptness and courtesy from those entrusted with the administration of the rule of law and respect those values. I think the daily application of the rule of law will be honored.

MODERATOR DEAN SMOLLA: Thank you judge.

SECOND QUESTION OF PANEL

MODERATOR DEAN SMOLLA: We are now going to change the format a bit. You no longer have to wait to be called on. Instead we'll engage in a wide open, uninhibited and robust debate, subject, of course, to the rule of law (laughter) and with humility; that's right, but not necessarily. I

will tell you that as I listened I detected some differences in accent among our English and American jurists, but I'm not sure that I detected any differences in content. That is to say screening out differences in pronunciation I am not sure I could have identified a comment by its country of origin. But let's probe that a little more deeply. George Bernard Shaw said that we are two people divided by a common language. I wondered if any sense, we are two peoples divided by a common law. Is there any sense in which our legal traditions have diverged for better or for worse? Are there any thoughts on that?

JUSTICE PHILLIS: Topical example perhaps relates to locus standi, the challenging of governmental action. In our jurisdiction we have almost swept away locus standi. Almost anybody can challenge governmental action; I don't think that's the same over here.

MODERATOR DEAN SMOLLA: Justice Breyer, is it? Can anybody in the United States file a lawsuit anytime.

JUSTICE BREYER: Well, he said 'just about everybody,' and I would say 'almost anybody.'

(Laughter) I mean you have to be somebody who is adversely affected or aggrieved under the meaning of the statute. We get into arguments about it in our courts but it is usually on the fringes. It's that hard. I mean, I think England all you want to do is say this is a bad law.

'What do you mean'?

'I don't like it on the books.'

'Why not'?

'I'm part of an anti-bad law society (laughter) and we have as our motto, wipe them off the books'.

Now, are you going to give him standing? No. We won't either. Well, we haven't practiced in each others courts. That's our problem. So we don't have an answer to that one exactly, but standing is pretty broad here, too.

JUDGE TACHA: Maybe at the Supreme Court (Laughter) But I do think we need to recognize the difference between our federal system where state – and I think Justice Holland and Justice McGregor both touched on it – state law and federal law, and standing is important in a host of statutes, where it requires state action, some kind of state action. The Congress likes to put that requirement in because of a constitutional constraint. So I do think that written constitution and how its divided power, both – among the three branches of the federal government, in our case, or between state and federal government is very important. And we do tend to spend a fair amount of time, at least in the inferior courts (laughter), trying to determine whether there is state action, and whether it's the kind of state action that a private can bring suit on. I think that is fair to say, Mr. Justice; is that correct?

JUSTICE BREYER: Nods head yes (laughter)

MODERATOR DEAN SMOLLA: Talk about the rule of law disintegrating, the moderator lost the microphone for a moment (Laughter)

JUSTICE ARDEN: Could I just give another example of the difference between English Law and that of the United States, which I'm going to draw from Justice Breyer's book on *Active Liberty*, but it seems to me to illustrate something about rule of law. The case I have in mind is called *Chevron*, and in that case, as Justice Breyer describes in his book, the court held that where a statute enacted by Congress left a matter obscure/ambiguous and gave an executive agency powers to act the executive agency could come to decision as to scope of power. Now, just analyzing that in the context of this discussion on the rule of law, I think, coming at it from the English point of view, I must say the interpretation of statutes enacted by Parliament is fundamentally a judicial function, and the rule would not defer to the views of the executive as to what a the statue meant. I know the *Chevron* case is being nuanced. But I did want to high light this as being an example of where the rule law might differ between the United States and England in its application, and it might belong to some discussion as to the extent which the rule of law can have different

applications in different contexts. I would also just like to remind you that our context we have a doctrine of Parliamentary sovereignty, though that itself is undergoing change.

JUDGE HOLLAND: I think that also brings up another but related point about our different approaches to judicial review. As Chief Justice Tacha mention *Marbury vs. Madison* and Justice Breyer was talking about how when the United States Supreme Court decides a case people tend to follow it. But even as you are setting up your separate Supreme Court you are not inclined to adopt our concept of judicial review.

JUSTICE RIX: Yes, that's right, which I touched on that but it seems to be a relevant question.

Would one say that the United Kingdom is not subject to rule of law because Parliament is supreme and can theoretically pass a law making it illegal for redheaded people to receive walrus licenses (laughter)? The answer to that, of course, is now increasingly qualified. First, Parliament can't pass a law which is contrary to European Union law and the European Union law is increasingly incorporating ideas of basic human rights. Secondly, if Parliament passes a law which is which is contrary to fundamental human rights, the British courts can declare the law inconsistent with the European Convention on human rights. That doesn't invalidate the law so it's not full blown judicial review of the American model, but the convention is that Parliament will then review the matter and change or reconsider the law. And in every case where it has ever happened Parliament has, in fact, altered the law or allowed the law to lapse, in a case where it was about to lapse anyway.

So, I think, we have to face the question whether, in the United Kingdom, we do have rule of law of the sort, since *Marbury vs. Madison*, is regard as axiomatic in the United States. And my answer to that would be, yes, but perhaps not in a purist principled way; but, yes, pragmatically because Parliament itself in legislating is subject to the control of public opinion, sometimes including extra-judicial statements made by judges. In recent years there has been at least one to restrain parliament from what appeared to be a fairly radical removal of any right of review of

immigration decisions; that was effective. But the fact that we got to that point certainly raised the question domestically we didn't need some stronger mechanism. But I think on the whole, we feel that existing mechanism has a democratic element about it which works.

Continuation of Panel on Global Issues and the Rule of Law

(Sound and transcription resumes after disc change)

JUSTICE MCGREGOR: I can speak, to some degree, about what happens at the state level. And I do think that the fact that judicial review is available sometimes changes the way that the legislative body acts. And that sometimes laws are enacted to make a political statement, even though probably the political body enacting them suspects it may not survive judicial review. So I think it may not only be the descriptive difference but something that also impacts the kinds of laws we all have to consider in our judicial roles.

JUDGE WILKERSON: Listening to our friends from the United Kingdom refer to the European Union and its legal approaches reminds me that the rule of law increasingly has taken on an international component, and it probably is going to increasingly take on that in the years ahead. There is a very hot debate in this country over the extent to which judges should draw purely on American law principles, and the extent to which they should draw on international law principles, including the course of the United Kingdom in their own decisions. Obviously, Justice Breyer, if you've been following this debate, has taken a very articulate and leading role in the discussion. It is a vast subject.

I tell you I was at a conference the other day, and we were talking about judges using international laws and international norms and international decisions being part of the American rule of law; and that judges should feel free to draw on them because we were part of the global community. And just to speak thoroughly practical for a moment. One of the lawyers on the panel said, 'Good grief, I just have so much trouble researching American law (laughter) and if these judges are going to carpet bomb me from 30 feet high with decisions from this country and that country and the other countries, I'm never going to be able to properly prepare my case. How do I know from which law of what country is going to be used for illustrative purposes when the

decision comes down? It's going to cost my client a fortune to research the law of the whole world.'

But I do think that one of the really critical questions coming up – and I suspect there is some diversity of viewpoint from these panelists – is the degree to which the rule of law is going to be a national phenomena and the degree to which it must be an international phenomena. As we become more and more members of a global community, I would really be very interested in hearing the perspective of some of our friends from the United Kingdom on this point, and the impact that law and the European Union has had on their deliberative processes.

JUSTICE RIX: Well, I think your question was whether our two countries have a rule of law divided by a common law. I think my slant on that is that over the course of my lifetime and increasingly, although, of course, differences abound, our systems are getting closer. Forty years ago when I was first studying law at university, we hardly had recognizable **inaudible** a system of administrative judicial review that is now in full force. Not judicial review, as has been said, in the sense as you recognize it, striking down of laws, but the challenging of the administration of statutes of law by the government.

Secondly, with our domestication of the European Convention of Human Rights, we are introducing to our courts – we see it everyday – a new diet of cases concerning human rights. I think it is noticeable in recent years how the diet of the House of Lords has changed. It is now constantly dealing with important constitutional questions and human rights questions and the diet of yesteryear, demurrage, under charter parties and so forth, has completely fallen away.

THIRD QUESTION TO PANELISTS

MODERATOR DEAN SMOLLA: Let me just explore that for a second more because really Judge Wilkerson and your points come together. As Chief Judge Tacha acknowledged, we're here at the home of John Marshall, who in American conceptions is sort of a person we associate as forging

the concept of judicial review, which has proven totally uncontroversial on one level in American life, but constantly controversial on another. I think that controversial side would be a question that many members of our panel have written eloquently about in a number of settings, and it is the extent to which fundamental issues of identity and policy and so on, become the stuff of courts, become stuff of litigation.

One of the great debates in the United States that has been going on for decades and is a large part of our politics as well as our legal culture, is whether that's good or bad; whether all of the great social policy issues that are part of what is often thought of as the 'culture wars' in America, belong or don't belong in our courts.

And I am sensing from what I am hearing is that in England there is a migration toward that. That things like human rights adjudication is – this is probably not the right way to put it, but almost making you more American in that sense, in that judicial review sense. Going back as far as deTocqueville who said, 'scarcely any issue in America doesn't ultimately become a judicial one.' I am wondering if you're seeing something like that in the United Kingdom.

JUSTICE PHILLIPS: I think we certainly are. I think the great change the Human Rights Act has made is that we are no longer allowed to defer to the executive and say, well, that's not really the judges business, it's up to the executive to decide on policy in this area, or make a decision in this particular case. Because if the executive decision is impinging upon one of the human rights of an individual, the court now has to apply its *own* standards, or rather the standards of Strasbourg, and apply a test of proportionality in order to decide whether the action is lawful **inaudible**.

MODERATOR DEAN SMOLLA: Judge, go ahead.

JUDGE STEWART: Well, just to comment on just the obvious. Proliferation of our technological advances has just literally made the law, wherever it is, available to so many people. In the federal system, we get a ton of litigation from prisoners. A lot of litigation that we deal with in our system is generated by the prisoners, civil and otherwise, but it is amazing the awareness the prisoners

have about various laws, statutes, etc. So, with the computer, people have access to foreign law, to rulings of other countries and so forth. So, at one point, without the technological advances one might have a barrier against knowing what's going on in another country or somewhere else. Now, if something **is not found not of precedential value**, in reality it's out there in the public domain.

My point is this, I think, there is a factor of awareness that is just sort of global, that transcends any issues that arguably might be social issues or policy issues or whatever, are framed as legal issues. And because they occur in so many common places, there is a tendency to want to look to see, take a peek at, how someone else has dealt with this issue. Particularly if you get something where there is no precedent. It is the first order of magnitude, and even though we are governed by statute, to wonder 'I wonder if anybody else has dealt with this opinion'? So, the tendency, instinctively, is to look to see. There is a question of how far to go with that, whether to be bound by it or just persuasive.

I guess my point is that the reality of technological advances of the day make it impossible not to know what's going on in other courts across the globe, etc. So how do we, sort of, have a barrier against knowing it's out there and not looking at it, and again, not being affected. Prisoners can find it and put it in their pleadings and refer to it, then, I think, that's just a dilemma that all of us as jurists have to deal with, as far as how we apply the rule of law both substantively and procedurally.

JUDGE TACHA: I have been reflecting on the combination of comments that have been made here. Judge Wilkerson's order vs. liberty and this Americanization – for lack of a better word – culture wars, judicial review. And I really – I am going to turn to my friend, Justice Breyer to answer it, so I am really just going to ask a question. But it strikes me that underlying a lot of this is a deep rooted quest for where sovereignty lies. Who or what, or which entity is sovereign? I was very please to see on this program, one – I think it is tomorrow, workshop or discussion, in our case it's Native American tribal sovereignty, but aboriginal around the world – because the liberal vs. order

point is one that goes to the heart of **the matter** -- is it the individual that's sovereign on this issue, or is it the government, state or federal in our case, that's sovereign.

And in behind the debate of international citation of international authorities is this question of is there a diminution in sovereignty if we cite two or, more particularly, rely on. The question is really; *rely on* the laws of other countries. And it's a very long way to ask the question, but it also brings me to my substantive vs. procedural. Some of the human rights conventions to which we are not signatory, would contain things there would not be universal agreement upon. And, so, it seems to me that that has a lot to do with how we define sovereignty. Justice Breyer?

JUSTICE BREYER: Just answer that! (Laughter) I don't know, so, **I'll three questions that I have.**

(Laughter)

MODERATOR DEAN SMOLLA: Just like the court (Laughter)

JUSTICE BREYER: One would be what happened to Jay's question? I thought it was a good question. I'm pretty interested in how you work with foreign law. I know we have cases like antitrust cases, other cases, where you have to know some foreign law; we're not going to get the answer right. And, so, here you have, I guess, imagined the E.U. Its normal way is to produce a set of regulations saying that if you live in Denver you have to put your rubbish out in four different containers. And there are going to be certain rubbish in a certain container, and will be certain days to pick it up, and it has to go to a certain kind of rubbish bin, and if you don't do it this way you get fined; these are fines and this is what they are to pay. There are four or five volumes, probably more than in the case of the Scottish fishing nets, but fewer than **inaudible** (Laughter)

So now you have to interpret this. Where do you look; because the E.U. might have looked at Slovenian law? I don't know, they wrote it in Brussels. Who wrote it; perhaps no Englishman? Maybe it was a combination of a Frenchman, a German, and a Pole, and they wrote these regulations. Where are you going to look and how do you find out? That's my first question.

The second is very much shorter: where have the business cases gone? I find for the same thing. And if they are all going to arbitration, is that a good sign? When I was over in your country I asked an arbitrator, ‘why have they all come to you; is it cheaper?’ He said, ‘no, we have better judges’ (Laughter)

MODERATOR DEAN SMOLLA: Took them awhile to be Americanized.

JUDGE BREYER: Third question is: You’re getting constitutions which I see quite a lot of virtue in, of course. But there is also a virtue in not having one and that is, it forces you to pay more attention to finding fundamental protections of human liberty, federalism, others, and statutes. And I really do think, it’s not just a hypothetical, the protections for states’ rights, the protections for human liberties is more likely to be real when you are interpreting a statute this way or that way, than you are when you announce the grand principles in a big capital case. And you’re used to that, I mean, that’s British from day one. So, will that change? Take your pick (Laughter)

JUSTICE RIX: I think I just heard another reason for not having a written constitution (Laughter) Judge Tacha’s introduction of the concept of sovereignty, based on the national limits which a constitution imposes, seems to me an unfortunate one and it’s certainly not a feeling which as a British judge one shares. I don’t think we have any real compunction about looking abroad to other constitutional courts, including your own, for inspiration; it’s not binding. Of course, there is the danger of selective citation by counsel, but if it’s useful and it’s inspirational, and it happens every day.

As regard to Europe, we’ve accepted that we have in fact de facto assigned part of our sovereignty to Europe and we are simply working within a large system. It may be one day that it will end up a fully federal system like the United States, but I don’t see any particular problem and certainly one shouldn’t feel hostility towards Europe, that would be thoroughly counter productive.

It is true that the drafting in Brussels is not always what is to be desired. I think it’s been described as ‘jinglish’ (Laughter) It’s drafted somewhere in the middle of Europe, deliberately, I

am told, so as not to be natural English idiom, because natural English idiom isn't always easy or best understood by other Europeans. The idea of Europe is to get away from any individual national system. There's very little question when looking to Slovenian law, indeed, if there is an unusual amount of Slovenian authority. That would be my answer to the international question.

I think, I wholly agree with what Judge Stewart said about the increasing awareness of traditions abroad in other countries throughout the world, by the world's citizens, and there is a general recognition, a general, I think, yearning, towards individual human rights throughout the world which is perhaps encouraged, if we take an international attitude of jurisprudence.

LADY JUSTICE ARDEN: I would just like to say that I agree with that. To go a little bit further with that, if I may, that all the judges are here reinforces the idea that we believe that there is value for our respective systems in discussing matters across national boundaries. I have a particular interest in international judicial relations and like to promote meetings between judges because of the value that there is in a cross-fertilization of ideas, and because it enables judges, by finding out about solutions in other jurisdictions, to unlock a potential in their own system for resolving a particular problem. They can't necessarily apply the same solution automatically in their own system, but it can give them the inspiration to find a solution to a problem in their own system.

If I may just answer Justice Breyer; we take it as axiomatic that we can look for inspiration to a foreign in a subject such as human rights, civil rights and constitutional law, where the issues may be the same.

I really like with that thought to bring this discussion back, if I may, to the question of the rule of law and to the relationship between human rights and the rule of law, it's a subject to which we started off. We can think of a system where there is no remedy provided for something like domestic violence. We would say there must be a gap in the rule of law in that sort of system, because there is no remedy for that particular form of wrong. That victim has no right to go to a court to enforce his or her right. Yet, on the other hand, there is a limit to the universality of rights.

If we take the following example, there is obviously a distinction between the rule of law and justice. Let's suppose that somebody commits a criminal offense, and Parliament has provided that the punishment for this offense a fine, let's say of \$100. Suppose the husband is charged, due process of law is followed, and after a proper trial the person is convicted, and the judge than says, 'this is a very silly punishment for an outrageous offense and I think this person should go to jail'. Well, it's not open to a judge in those circumstances to send a person to jail. He must impose the fine; that is a consequence of the rule of law. The only way out of it would be to say that the rule is so irrational itself offended the rule of law. But I believe that would be a very, very exceptional situation.

So, there are issues there, between the relationship between the rule of law and substantive rights which we haven't fully explored. There are also issues, I think, about the scope and reach of the rule of law. We have talked about the geographical spread of the rule of law that is whether it applies in different countries, but we can also think of it in terms of time. There was a point in time, in English law, where it was considered that slaves were non-persons. They were not entitled to protection of the law. They were indeed themselves property. I'm sorry but that was so. So, then there was a category of non-persons. Do we today accept that there cannot be categories of non-persons within the courts' jurisdiction? If there were such a category, that would be a breach of the rule of law.

So, there are all these different issues to explore. I very much agree with what has been said by Chief Justice McGregor about the work of the judges being very much a team effort with society to make sure that we are enforcing the rights which society has every expectation will be enforced by the legal system. Thank you.

MODERATOR DEAN SMOLLA: Thank you. Ron.

JUDGE WILKERSON: One of the things we've talked a lot about today is an independent judiciary.

I think, that those of us that are in the courts have got to realize is that doing the coming years,

judges are going to be subjected to more and more criticism. And it's probably going to be harsher and more direct; even though throughout our history judges have been subjected to severe criticism. There are a lot of conditions today that are going to auger for very harsh criticism of the judiciary.

One is simply the fact that the media landscape has changed so dramatically. You have talk radio and those shows are not gentle. You have bloggers and bloggers are by nature highly irreverent. If you don't believe me, there used to be a blog called *Underneath Their Robes* (laughter); it was not, at times, the most respectful. Congress, through its legislation has injected judges into all kinds of controversial subjects, and the Constitution, in addition, hardly allows us to avoid issues like separation of church and state, the meaning of the Eighth Amendment as it pertains to capital punishment, a host of other things. So, I see in the next 20 or 30 years, particularly here and I am not sure what the climate would be in the United Kingdom, but I think those of us on the bench are going to be the subject of ever sharper criticism. And I think we are probably going to have to just get used to it and accept it as part of the job.

Does this pose a threat to the rule of law and to the independence of the judiciary? Normally not; because we are appointed for life and people should be able to speak very bluntly and in sound bites and soap boxes and everything else, and take us to task. At times, it really goes over the top. I was just thinking, when we were discussing the use of international law opinions, I happen to be very cautious about judges sues Ponte drawing on international law principles in the absence of a treaty or legislation, or commercial contract or something that makes international law relevant as a gateway matter, apart from the judges own predilections and imaginations.

But you can go too far, again, in your criticism of this trend. There was a Congressman, Tom Pheny, who several years ago introduced an amendment that was quite popular in the House of Representatives; he wanted to impeach judges for citing international law decisions, or make it an impeachable offense. That's just way over the top. We can debate this question of the degree and

circumstances in which international law can be drawn upon, but some things are out of bound.

You don't get impeached for the way you approach a decision.

I urge you to follow this criticism of judges. Decide in your own mind where it is healthy and a lot of it is very, very healthy and necessary. And decide in your own mind, 'no, that just goes beyond the point,' and you are really trying not to criticize in a constructive way, but you are trying to intimidate. It's that line robust criticism and outright intimidation that I think poses a threat. Intimidation does really pose a threat to the court system and its proper functioning. I'm not sure whether you sense in the United Kingdom this rising tide of criticism toward judicial acts. Maybe it's not a phenomenon there.

JUSTICE PHILLIPS: It certainly is. Particularly in the criminal field, the media, not all the media, the more popular press, delight in attacking judges on the ground that they have been over lenient in sentencing. I think this has been partly responsible for the fact that over the last ten years the level of sentencing has crept up by about 20 percent. Of course, the media can criticize judges, but I do believe they have a responsibility when they do so; not simply to be publishing whatever they think is going to sell their newspapers.

THIRD QUESTION TO PANELISTS

MODERATOR DEAN SMOLLA: Well, it seems hard to believe but we have only about 10 minutes left. Quite appropriately we have been focused a great deal on what we share and on our points of divergence with regard to our truly, ancient shared heritage; a heritage that certainly does go back as far as Magna Carta – which some of you may know. By a wonderful coincidence one of the four copies of Magna Carta is here in Virginia right now. It's open to display at the Virginia Beach Contemporary Art Museum.

But I want to force us all now to think about this from yet one more perspective and probably the hard one for all of us. If we broaden the lens outside of our stable and strong traditions of the rule of law, in our two cultures and we ask ourselves instead, 'how we see the conduct of our two

nations, in relation to this noble idea when we intersect with other cultures, and what the future holds for that ongoing intersection. What are your thoughts?

I suppose it is worth mentioning, first of all that this is after all the 400th Anniversary of Jamestown, in which European cultures encountered the first Americans, and too many American Indians, certainly to many members of the Virginia tribes – I see a number of you out there in the audience – the concept of the rule of law doesn't rest easily. It looked more like a power grab and an exercise in arrogance. And we all know here in the United States and, of course, in Great Britain, we are part of a great world debate over the conduct of our two nations and the extent to which we respect the rule of law at large. So I am interested in the thoughts of some of you on those relatively difficult issues.

JUDGE MANCE: I would like to answer your question a little obliquely. When I was born, long time ago (laughter), hardly any countries in Europe were democracies, the democracies of Europe could be counted on the fingers of one hand. Now, to a greater or lesser extent, the practice of democracy changes, from democracy to democracy, of course, we recognize that. The whole of Europe is democratic. I think that has been – at any rate speaking as a European, the great change in my lifetime.

I go back to my opening remarks. I stressed that for me the significance in the rule of law, the equality of everyone under the law and what that means in terms of recognition of human dignity and personal autonomy. I think these are very important issues and I think one of the reasons the rule of law is being spoken of more and more these days is because democracy has proved attractive to so many more countries, increasingly so. And I don't think we should be ashamed of that. I don't think we should be militant about it, but I don't think we should be ashamed of that. I think more and more countries are turning to democracy and that the meaning of the rule of law is, now days at any rate, intimately connected with democratic values, and the recognition of the

importance of majority opinion, but also – and they go hand in hand – the recognition of the value of diplomacy and minority values and the importance of protecting them.

MODERATOR DEAN SMOLLA: Other Thoughts.

JUDGE RIX: Yes, I wholly agree we that. I think we shouldn't be ashamed of the values to which we subscribe and the underlying concept of natural justice, which is behind the rule of law, is one which when you go to countries that haven't achieved democracy – My wife and I were in Viet Nam, Cambodia and Laos, last Summer, speaking to people there. They know that they have governments which are communist-established, in political terms at any rate and though in economic terms they are increasingly other, they want democracy. The globalization of communication means they know very well that involves and they subscribe to values to which they hope will someday come home to their countries in institutional terms. But I think there are people working in countries like that, to that end and I hope it occurs.

MODERATOR DEAN SMOLLA: Justice Breyer.

JUSTICE BREYER: I agree with what has been said. I particularly agree that we have seen some advances here. What I think of personally is on Nine/Eleven, Sandra O'Connor and I were in India, we arrived there that day. We were supposed to go to a meeting with the judges, lawyers, and so forth, that very morning – it was afternoon there, night there, was when this attack occurred and we saw it on television. Of course, the reaction there was very emotional and very supporting. We talked to a lot of the judges still, and the lawyers, they wanted to keep us in the embassy, but we broke free (Laughter)

My overall emotional impression was the actual division in the world is not national. The actual division, the important division, is between what I call the forces of reason and the forces of irrationality. And we were all on the same time and there was no difference between the Indian lawyers, judges and us. Everyone in this room is in the community of what we call trying to

further the force of reason. That's the important division. So, that's one thing that occurs to me and point out one way in which that's being done.

The second thing that I think of is what I call a technical people. Some of us we have fancy titles, we're not politicians; we're technical people, and we have a technical job to do. And that technical, professional job is going on all over the world. It's like the law is growing together, whatever politicians might say about this or that, the simple fact is that business is international. They pay a lot of legal bills and they want to do business throughout the world. And human rights, the desire therefore, is international. In this country we have 350 Million people, every race, every religion, every group, as I said, under the sun, and we live together under a rule of law. And we try to guarantee everybody will have rights and that's not an unpopular thing.

But it's like what we are doing is weaving, it's like a Penelope's loom or something; we're putting the little threads together, and that's the level at which we were. And it goes on. Like, what was that Like Virgil's Bees; I remember that in high school, they are out there working, putting this together, whatever the political people may say. But there are forces the other way, but we keep out of our job.

The third thing it reminded me of is something I read or heard, is that Jack Kennedy, when he was President, what his father I remember told him, he said, 'basically, what you do you'll be president – I guess he told him, or what ever, but he said you get people together; different people, different people, of talents, different talents, different abilities, from different backgrounds, different groups and try to get them together – and what's the word you want today – help, they help. They help what? They help each other, trying to produce something. They're trying to help, whatever that might encompass. I think of that and I think of, of course, you have brought people from different nations and groups, different traditions here today. Well, I think that's good. You are helping. Might help make a difference, who knows; but anyway we keep in our **inaudible**.

MODERATOR DEAN SMOLLA: Well on those various optimistic notes, I think it is very moving to note that these very distinguished jurists have ultimately linked the conception of the rule of law to such basic human quests as human dignity, and rationality and democracy. We began with a quote from Winston Churchill. Let me begin to end with first a quote from his great contemporary and ally President Franklin Roosevelt who said,

‘Let us never forget that government is ourselves and not an alien power over us. The ultimate rulers of our democracy are not a president, and senators, and congressmen, and government officials, but the voters of this country.’

And at the risk of embarrassing one of our panelists I will say that I heard an echo of this in Justice Breyer’s book *Active Liberty*, which Lady Justice Arden previously referred to. Let me end with a nice passage from the end of Justice Breyer’s book in which he is talking about (Audience laughing at Justice Breyer) in his usual modest way, the wonderful importance of judges and justices as explainers, speaking to ordinary people about the values of our society, and he writes this,

‘Still courts, as highly trusted government institutions might help in various ways.’

He’s speaking about helping the rule of law and the democratic experiment. And he says this,

‘Judges can explain in terms the public can understand just what the Constitution is about. They can make clear, above all, the Constitution is not a document designed to solve all the problems of the community at any level, local state or national. Rather, it is a document that trusts people to solve these problems for themselves, and it creates a framework for a government that will help them do so. That framework forces democratically determined solutions protective of the individuals’ basic liberties. It insures to each individual that the law will treat him or her with equal respect. It seeks a form of government that will prove workable over time.’

I think what we have been privileged to hear this afternoon our judges doing what Justice Breyer suggested is a high calling, explaining to ordinary people the core values of our traditions and our shared system. So, please join me in thanking these fine jurists for their public service (Applause).

And now you are all welcome to join us in a reception booth lobby outside of this auditorium.

DISCS #3:

April 11, 2007

University of Richmond

Xu Wenli China and the Rule of Law

Disc opens with guests at reception.

MODERATOR DEAN SMOLLA: Welcome to the second day of the Rule of Law Conference. I

am told that some of our visitors from outside of Richmond were remarking, as they wound their way around the lovely surroundings of the campus, that the homes were beautiful, the dogwood were in bloom and that we, in fact, spared no expense for this conference (Laughter) We had the dogwood planted just for you, and, of course, the homes are where most of the faculty lives (Laughter)

We will have a delightful day today, with an extraordinary variety of speakers. I will in the spirit of the rule of law, exercise just some admonishment. All of you that have roles as a moderator, as a part of today's program, it is very important that we try to start the programs on time and end them on time, as a courtesy and respect for all of our participants. So I will be a relatively ruthless global moderator and intervene.

I am very, very please this morning to be able to introduce the person who will perform our introductions. For a lot of people in the world the struggle for the rule of law, and the struggle for human rights is not an academic matter or a legal abstraction, but it is a matter sometimes of life and death or imprisonment. Our speaker this morning is an exemplar of that. I am very pleased that my colleague, Noah Sachs, who is a new member of our faculty, from Harvard, was Xu Wenli's legal advocate and champion during much of that time, and I'm going to ask Noah to come to the podium and introduce our first speaker. Noah.

Introduction of Speaker: Noah M. Sachs, Assistant Professor of Law and Faculty

Director, Robert R. Merhige, Jr., Center for Environmental Studies

I first met Xu Wenli in January of 2003, I believe. It was about two weeks after he had been let out of a prison cell in China. I was the lawyer who was handling his asylum case here in the United States. The typical problem in asylum cases is finding the information, finding documentation to tell the client's story. And, of course, in his case it was the opposite problem; there was an overabundance of information. He has been a leader of the Chinese Democracy movement for almost 30 years. Xu Wenli was one of the founders of the Democracy Wall movement. He was arrested for the first time in 1979, and at that time he was the publisher of an underground newsletter called the April Fifth Forum. He was charged with trumped up charges of illegally organizing a group to overthrow the government and began a fifteen year prison sentence in 1981.

During this time in prison he was allowed only three visits with his wife, his daughter, Xu Jin, who is also here with us today. Where is she (He Xintong stands and Applause)? For some of those years in prison he was placed in solitary confinement. He was released in 1993, and he believes it was in part because Beijing wanted the Olympics in that year. So, he was released and paroled. As a testament to his spirit and commitment, he immediately took up his pro-democracy activities again and founded the Chinese Democracy Party, of which he is still the head today. About five years later he was jailed again, and then was released at the end of 2002, on Christmas Day. The U.S. State Department considered it a big victory because they had been trying to get him out of China for about a decade. He is one of my heroes. He has been called the *Nelson Mandela of China* and the *Godfather of Dissent in China*. I am honored that you are now speaking at the University of Richmond Law School and let's give a huge round of Applause for a true fighter of democracy, a true fighter for the rule of law, Xu Wenli.

(Translation by daughter, could not understand name)

MR. WENLI: Good morning. I like Richmond University. I can only express myself with those two sentences of English, so from now on I will speak in Mandarin. I would like to apologize. I

know this will waste a lot of your precious time. We have 35 minutes to speak to the audience and then 20 minutes for question and answer.

Most people will look at someone like me and think, perhaps I am crazy. How can someone possibly sacrifice the most beautiful, youthful part of life to be in prison? I know some of you are preeminent judges and have sentenced people to long prison sentences. To you, that is very righteous behavior, and I agree, but in my case, being in prison was definitely not something that I chose to do voluntarily. I wish to talk today about some of the most difficult periods during my time of imprisonment in China. At the time I was in my young thirties, so I could be considered a young chap (Laughter)

Well, before entering into prison I was a fearless young man. I didn't fear anything; I didn't think I did anything wrong. But at that very moment, just when I was entering the prison gate, I did feel a jolt of apprehension.

He is just saying that he doesn't normally prepare speeches and manuscripts, and so if I make any mistakes in translation, he saying that it is his responsibility. But it is really mine (laughter)
Xu Jin.

At that point in time, I was feeling very apprehensive because I was in my thirties and to be sentenced for 15 years – to fifteen years, I wasn't sure I would make it out of that place alive.

Then I had the thought of putting down into words, "Why? Why did I sacrifice fifteen years of my life; for what?" I was going to put those words into a book, an autobiography. Well, at that time, because I was a special prisoner, because of my unique circumstances and my high profile, I was kept in solitary confinement and the normal person couldn't enter my cell. So, at that time, there were two policemen in charge of taking care of me, and a supervisor, and even they very rarely entered my room. And they also had fellow prisoners staying around me, observed me, but they only did this through a peep hole.

And, so, taking advantage of the minimal supervision that I had at that time, I began penning an autobiographical account of my journey thus far, why and what I was fighting for. I have written this book. And, in fact, I used very ingenious methods to smuggle this book to the United States, even though I knew I would pay an even higher price for doing so. But at that time I thought it was fully worth it because I didn't know if I would leave the prison. Even if I died in that prison, I would be proud of the fact that I put down my thoughts and aspirations into this book.

So from a cell that was only six meters, I was put in a cell that was only two meters by three meters, I was put into a cell one meter by three meters—into solitary confinement. Not only was I put into solitary confinement in my own one-by-three cell, but they evacuated all of the other prisoners from the surrounding cells. So that I was, in effectively put in solitary confinement in a whole row of one-by-three cells. I stayed there for a total of five years in this three-by-three cell which had no windows. I was totally denied any access to my family and friends. Of course, in doing so, they hoped to force me to tell them how I managed to smuggle these materials out of prison. I am glad to say I disappointed them. Sorry to say that I have to disappoint all of you sitting here, but I cannot divulge those secrets (Laughter)

At that time, not only was the loneliness unbearable, the heat, especially in the midst of summer, was also unbearable. Even if I stripped my-self all the way down to a little pair of boxers I was still sweating profusely, like a cow. There was definitely no air conditioning in that prison. So, I had to press my body against the concrete walls to cool my body temperature. And so, because I was in solitary confinement, I tried to wipe away my feelings of loneliness and pass away time by observing little things like the little spider in my room — how it would procreate, how it survived. By doing such little things, I managed to keep myself from going crazy, and to entertain myself and pass the time. Today, if there was a mosquito flying in front of me, I would be able to tell instantly if it was male or female (Laughter) But the secret to telling the mosquitoes apart is really that the female has the sharp pointed end in front of her and the guy would have a flower shaped

object. So that is the secret, so now you know how to detect. That is all I'm going to discuss about myself and my personal autobiography today.

And, so, today, the theme I'm going to talk about is that a healthy and vibrant democracy is the sum of freedom and the rule of law. That is the theme for today. This theme is very broad and it's almost impossible to talk about it in detail in this very short period of amount of time that I have now. I'm sorry if I may seem a little presumptuous and offensive in this, but I'm going to start out my case by making some criticisms of the American judicial system.

I know that as American scholars yourself, you would also like to hear some criticisms and some objective feedback about the system. For some dissidents, and myself and many others that tried to flee the oppression of the Chinese communist regime, I am sure all of them hope to settle down in such a free and democratic country like America in search of their ideal life. But after coming to America they start to get a little perplexed because they came with the idea that wealth is given to you by someone. Someone brings wealth and riches and all this freedom right in front of you, but after coming here they realize it is not so.

I wish to offer two examples here. One of the cases is about my friend who is currently here in the audience today. He has had a very embarrassing encounter with the American jury system. This man is actually a victim of deception by this person who used immigration laws in America for his own profit. In fact, he cheated not only my friend of his money, but also his two daughters of this man. However, because of the jury system of America, this man, who abused the two daughters and cheated the victim financially, has been able to go off "scot free." And so this man is very perplexed and wondering: "If the American system is supposed to be just; why then, am I not able to get the deserved justice?" And so this other friend traced the root of the problem back to the jury system of America. And so this friend – I am not able to elaborate in detail about this case right here, but my friend has written a document about it, which you can get later on after this conference. This man, he realizes he is not able to change the American system, and so harbors

this hope of transforming and revamping the system of China when democracy comes to the country one day. So this translated document will be ready for you later on.

But I told my friend, ‘don’t be pessimistic. The people of America, they love to listen to feedback and criticism. So, I am going to bring the document right here today so people can have a look at it. And so we know that some very notorious people that should have gotten very long sentences, like O.J. Simpson, got off Scott free. And so the father of those two daughters that were just mentioned before are also sitting in the audience today, he hopes to be able to get your help in fighting this case.

And so as I mentioned before, these people come to America and are perplexed. Their perplexity lies in the doubts about whether they would be able to get justice in a system like America. My friend's name is Mr. **inaudible**, and he is seated right there; if any of you can help him that would be extremely appreciated. He will be staying here much longer than I am because I have to rush off to **inaudible** right after this.

The next thing I want to talk about is, well, I am a member of the Chinese Democracy party and also its founder. The party was founded in 1998 in Mainland China. More than fifty of its top leaders, like me, have been imprisoned in China and to date there are still more than thirty people remaining in prison. But yet some unscrupulous people have set up a fake. So, they basically use the banner of the Chinese Democracy Party, publicize our plight, and use it for their own personal advantage. And, so, because of that, the unscrupulous behavior, now there are three, four or even five different Chinese Democracy Parties in America today.

Well, I understand that America is founded on law, and so in order to immigrate to America there are certain legal procedures to be taken. But a lot of people have exploited loopholes in the system; use the immigration laws to trick people out of their monies, saying that, “Yes, we’ll help you with your immigration procedures,” and in the process, trick the person, and also taint the reputation of the real Chinese Democracy Party. For those of us in the real Chinese Democracy

Party it is our conviction and our determination not to charge people for money if we see that they have genuinely been persecuted. It is our policy to help them, to write letters for them, to appeal for immigration status and not receive a single cent. But for these people who are doing it purely for profit, they charge from \$1,000 up to \$10,000 for these services.

For a lot of us who have successfully fled the oppressiveness of the CCP (Chinese Communist Party), I consider myself one of the more luck ones. I mean, able to be a professor at Ball University and receive a stable income, but I'm the exception to the norm. Most people come here, they have to risk their lives, and do heavy manual labor just to survive.

And so the genuine people who have fought for China's freedom and democracy are actually the people who are getting poorer and disadvantaged by their circumstances. Whereas, these people who have done nothing for China, they are profiting from it. All they want are a photo opportunity. So, they call themselves the Chinese Democracy Party; they try to get photos with top political figures in America, and that's all they want, nothing more than that.

And therefore, the second perplexity comes from people like us, in the real Chinese Democracy Party, who are wondering why is it that the judicial system in America doesn't support genuine activists like us, but instead allows and facilitates the illicit behaviors of the fake Chinese Democracy Party members. But based on my knowledge, and especially now that I have come to America, and based on my real experience in the American judicial system, I am convinced that there is a loophole, a flaw, in the perceived perplexities of this people. They have neglected this one very important point, these people that are complexed, and that is America is a country built on the rule of law, and built on the premise that everybody is born equal and have equal right of access to opportunity. The uniqueness of this system is that no *one* party can go out there and be this "big judge," like the CCP is, saying that you are allowed to leave, you are not. And as much as righteousness has the freedom to survive, so does evil in this society.

So, America is precisely in this conflict and battle between good and bad, righteousness and evil. But America has progressed and blossomed as a society. America's freedom is one that does not discriminate amongst people. Whether you are good or bad, you have the freedom. As I understand, your Preamble to the Constitution consists of fifty-two words, of which a lot of emphasis is placed on freedom and happiness, based on freedom.

So, in America, we see the separation of religion and state; Kaiser is Kaiser, and God is God. So, Americans very cleverly left the insolvable issues to God to handle, and so there is no one to say that, 'yes, you are allowed to have this kind of religion and belief,' or 'no you are not allowed to have that belief.' There is no such thing in America. Everyone has the freedom to believe in what they want to. And I believe, and I think – (*Xu Jin "Sorry, I was interrupted."*) And I think that really the things that government can control from the outside are very, very limited. What goes on in peoples' minds and their beliefs and convictions is what is most important. Freedom of speech is extremely valued in this country. And I know that there was an American president that once said, 'I would rather not have a government, but I need to have my freedom of speech.'

Well a lot of Chinese dissidents have this idea that freedom of speech is the most important. But for me, yes, it is important freedom of speech, but more important is the freedom of thought. America's strength and prosperity today comes from its belief and upholding of freedom. But this freedom is not the freedom to impede another people and take advantage of them. This is a freedom restricted and constrained by law.

In 1871 (Sic) there was an assembly to decide upon the Constitution, and over there it was through majority rule, this form of principles I was talking about, was cast into stone. They took five months in order to cast these key principles into the Constitution that it is today, and that is something I very much admire and wish to emulate. I am convinced that while I am unsatisfied with things today, they can be resolved by working with this system of law. And, so, I tell my friends, don't be discouraged; your problems will be resolved.

So, we the Chinese Democracy party, have a firm belief in the rule of law. We hope to convince China to create this kind of constitution for our country. We wish to bring China back to the republic that was created by Mr. Sun Yat-Sen in 1911, which has been abandoned since 1956. So on the fourth of June the Chinese Democracy Party is going to have our first representative assembly in Providence, Rhode Island. We are going to gather the top dissidents from all over and over seas, and bring them to Providence for this monumental meeting. In this meeting, our key theme is going to be creating the Third Republic. The first republic was 1911-1936/'37, and then Sun Yat-Sen 1937-1956. Now we are determined to create the Third Republic for China.

Clearly we are short of time. Thank you (Applause).

PROFESSOR SACHS: We have time for a few questions. I think there is a mike in the audience.

AUDIENCE: Given that at the end of the Cultural Revolution, I believe, there were no courts, no judges and no lawyers in China, and even now the majority of judges are retired army officers or promoted court officials, although there are an increasing number of trained judges. Do you not think that if you were being tried on a charge in China you would rather be tried by a jury rather than a judge or a bench of judges?

MR. WENLI: Are you a lawyer yourself (laughter)?

AUDIENCE: Guilty.

MR. WENLI: I know it is a very exciting process to see lawyers fully display and use their talents to convince the jury to their side. This process is very exciting to see this lawyer displaying his talents for me, but at the same time, if the jury was untrained they might very well be easily influenced by what the lawyers say. So we can't really compare the ignorance of the common jury, regarding legal issues, to this court of the judicial member in china, because court officials being judges in China they shouldn't – they have no right to be ignorant about the law. Because this people, they are running on taxpayers' money. They take taxpayers' money and so they have a right to perform their duties well. So, I think this people, when they don't perform their duties

well, they have a right to be criticized. But because **inaudible** incomparative [sic] it is unfair to compare this people with the common jury in America. In response to your question, I would choose a jury here in America (Laughter)

PROFESSOR SACHS: Unfortunately, we are out of time, but Mr. Xu will stick around for a few minutes to answer further questions. Let's give him one more round of Applause (Applause). Also, on behalf of the Law School we want to present you this gift for coming here today (Applause).

DEAN SMOLLA: We want to thank you very much. I am sure that I speak for everyone in the audience in saying that not only do we admire your courage but your exuberance and good spirit. Many people having been through what you have been through would have come out embittered and you are not embittered. You are an exuberant and even joyful advocate for what you believe and that is inspiring for all of us.

We'll take a ten minute break and then reconvene.

America Religious Freedom and the Rule of Law

Disc opens with Dean Smolla introducing **Bob**

DEAN SMOLLA... and prior to that he was dean of the University of Arkansas at Little Rock Law School. Bob is truly one of the nation's great leaders in law and legal education. He has been an extraordinary leader with the American Inns of Court movement. Particularly dear to my heart and that of some others in the room, is that Bob has been for a long time one of the leaders among the Sorority and Fraternity of American Law School Deans. He has for a long time been the Chief Instructor of the American Bar Association's School for New Deans, and indeed Dean Ken Starr and I attended that school together under Bob's tutelage, four years ago at Northwestern in Chicago. Ken passed with flying colors, but I've been told that I have to repeat (Laughter) It's a delight, Bob, having you here and we look forward to hearing you and this distinguished group of panelists.

BOB: Thank you Rod. Actually, Rod is being modest. We have a test at graduation at the New Dean's School. The New Deans School used to be in Winston Salem, in my backyard, and we had a swimming pool and we had the graduation line across the swimming pool from the warders. We said if you could walk across the water you graduated summa cum laude. Rod and Ken both almost made it, they graduated magna cum laude. No one has ever graduated summa cum laude, yet.

I also want to salute Rod for this great conference; he is one of the co-founders of the conference. I also want to salute my good friend Don Lemons because Don has been the one entity both here in Virginia and the American Inns of Court who has had this as a goal for several years. This is one of those conferences where you think, 'Well, it can't be this good,' as he describes and it's even better. So I want to salute these two co-founders (Applause).

I was excited to be asked to moderate this particular panel about Religious Liberty and the rule of law. I thought there would be a hook to introduce the panel but the fact that I thought that Jamestown – as many of the early colonies might have been founded around the principle of religious liberty, of people looking for religious liberty. I was disappointed, however, to read in my good friend Don Lemons article in our Venture Magazine about Jamestown; that at the setting off of the three ships from England to America, they commissioned the writing of a special ballad which was sung at the docks. A pertinent part of that ballad was, ‘*And cheerfully at sea success you still entice to get the pearl and the gold, and ours to hold Virginia earth’s only paradise.*’ They didn’t want religious freedom, they wanted pearl and gold. They were the first American entrepreneurs, capitalists, apparently; but some of our colonies were founded primarily for the purpose of religious freedom.

In the spirit of this conference between the two sides of the Atlantic, I had the good opportunity last week – in fact last weekend – to spend the weekend in Charleston, South Carolina, with Lord Harry Woolf and Lady Margaret (Should be Baron instead of Lord), the immediate past Chief Justice of England and Wales, and we took a tour with a very prominent historian there. They explained that religious liberty was a hallmark in the founding of Charleston. Harry and I happen to come from two religious traditions that in England. At the time, because of an oath you had to take, we probably could not have risen to high positions were we there and we were very impressed with that.

On the other hand, Maryland was founded for religious freedom; primarily the thought was for Catholics. And in the wonderful book by Randy Holland and Eric Stockdale that we were all given, in the chapter on Maryland, Eric pointed out to me that the colony of Maryland was backsliders that the Catholics regressed.

So, by the time of the American Revolution and the writing of the Bill of Rights after the Constitution, we put in a clause and it was in the First Amendment, was Freedom of Speech, the

very first amendment. It has a Free Exercise Clause and the Establishment Clause, and we are going to talk about the tradition in both countries, and in fact the world, with this glorious panel for the next 90 minutes.

I am going to introduce the panel and tell you a little bit about what they are going to cover, and then I am going to sit down until they are finished, and then we are going to allow time for them to have interaction with you. I've given them a time and I'll try to be fairly ruthless with the time.

The first speaker will be **Lord Jeffery Bernard Rix**, of the Court of Appeals of England and Wales. Bernard will talk about the British perspective on Religious Liberty and just the general philosophical tensions in the concept of wherever you are in the world.

He will be followed by **Dean Ken Starr**, former solicitor general and Law Dean at Pepperdine, who will focus on the free exercise clause in America.

Then **Professor Erwin Chemerinsky**, of the Duke Law School, will focus on the Establishment clause, the Establishment Law here in America.

Judge James Spencer of the Eastern District of Virginia will talk about creative tensions between Free Exercise and Establishment issues, and focusing on issues particularly bubbling up here in our courts now.

Ambassador Robert Seiple, President of an appropriately named group, Council for America's First Freedom, will talk about the international Religious Freedom Act of 1998 and will touch on the very serious issue in countries other than Great Britain and America of religious liberty.

I introduce first, Lord Justice Bernard Rix.

LORD JUSTICE BERNARD RIX:

Religious Liberty

Thank you. It is a great pleasure and an honor to be your guest at this conference and asked to speak at this session. I'll speak to you about the British and other parts of the world perspective. As you know, Britain has no written constitution; moreover, it has an established religion, the Church of England. That's an accident of history because Henry, VIII, wanted a son and, therefore, needed a divorce.

I think history plays a large part in a nation's concept of law and of its practice behind the curtain of the law. I will say something of that. When I went to my first school, a long time ago, I went to a religious assembly every morning. I learned my Anglican hymn tunes there. For a Jewish boy, of immigrant stock, that was, I think, a very good thing. To American ears, however, such school assemblies, no doubt, sounds appalling. So probably does religious education that goes on now days in British schools under the name of religious studies, one of the fast growing subjects in school curricula. That seems to me to be a definitely good thing.

Also in the school curricula, this time under the heading of 'history,' is the subject of the holocaust. That's also a good thing. With knowledge of each others faiths and of each others histories, comes greater tolerance; tolerance in this field is everything. The rule of law speaks of freedom of religion and tolerance, and there is also a need of freedom from religion and tolerance is the key. There are, of course, limits to tolerance for it is necessary to put limits on intolerance.

Britain thinks of itself as homogeneous but it is, in many ways, a land of immigrants. Nevertheless, the 2001 Census suggests that no less than 72% of the British regard themselves as Christian, of whom the majority will be Anglican, albeit there is a substantial Catholic minority. In 2001, three percent regarded themselves as Moslem; I suspect the figure is already higher now. In many European countries such as France, the Moslem population scales 10% and has doubled relatively recently. France contrasts with Anglican Britain by being 80% Catholic.

Now, what does an established church mean for Britain? It means that a score or more of senior bishops have a guaranteed seat in the House of Lords, our second parliamentary chamber. The

monarch must be an Anglican. The Anglican Primate of England, the Archbishop of Canterbury, holds one of the foremost offices of state. Only Christianity is capable of being blasphemed under criminal law.

Great events in the life of the nation: coronations, state funerals, memorializing of those lost at war, and celebrations of national thanksgiving are marked and are expected to be marked by religious services. Each year, all judges go to Westminster Abbey for service, to be reminded of both the significance and the insignificance of their role beneath the judge of all the world. I've heard no complaints of that.

And yet Anglicanism is – I hope I'll be forgiven for saying so – pretty mild, some say even apologetic, too apologetic stuff. Perhaps an established church needs to be apologetic. Certainly, there is no unanimity of thinking between the established church and the government. The church nearly always criticizes government on social and other policies.

There is no such thing in Britain as a religious right, which floats together and influences public debate. We live in a secular, multicultural society. The prohibition on Sunday shopping was abandoned by Mrs. Thatcher, and only very recently the pleas of Christian adoption societies, which seek exemption from statutory requirement not to discriminate against gay couples who wish to adopt children, have fallen on deaf parliamentary ears.

Along side our established religion is a multicultural, secular state. Multiculturalism is one of those difficult words whose content is imprecise, but I suppose it speaks of the tolerance of diversity and difference. There has been recent concern, however, that British multiculturalism has led us astray, with the realization that some communities, or certain elements in some communities, do not share common, national assumptions, even to the extent of disaffection.

It is said that our desire to avoid the compulsion of assimilation has led to a failure of integration. Admiration is being expressed of the model of the United States, which seems too many

of us so successful at integrating its immigrant communities into a common citizenship of shared values, while still preserving the pride of those communities in their cultural heritages.

It is, I suspect, in large part because of the establishment of a state religion that in the past the law has not been much called upon to regulate religious life within the nation. Without a First Amendment there has been no need for us to define the limits of the separation of church and state.

Within the last decade, however, a combination of circumstances has led to an awakened interest in the necessity and the ability of the law to resolve issues caused by religious conflict. In 2000 we domesticated into our own law the European Convention of Human Rights, with its Article Nine guarantee of thought, conscious and religion. In 2001 came the calamity of 9/11 and with it the new age of conflict of ideas in which religious belief plays a role. Since then there have been in Britain – there have been a new but small and constant stream of cases coming to court in which the dictates and limits of religious tolerance had to be adjudicated.

Thus, the last few years have seen for instance the following issues debated, among others: whether a ban in schools against corporal punishment can be enforced in Christian schools whose parents and teachers believe that a denied form of such punishment was a necessary part of Christian education for life. The answer that the court gave was, yes, but only because the state could justify what was otherwise regarded as material interference in the manifestation of religious belief.

Another issue was whether a Christian employee could be dismissed because of his religious objection to working on a Sunday. The answer, yes, but only because of the finding that the employers had done everything they could to accommodate his wishes, which mean that his dismissal could not be described as unfair. Thirdly, for instance, whether a Muslim pupil could be excluded from school because of her desire to wear a full-length jiljab, in breach of the school's uniform policy; answer, yes, I'll return to that.

Article Nine, I should mention, is very much in the form of earlier language in the 1948 Universal Declaration of Human Rights and the 1966 International Covenant of Civil and Political

Rights. It protects absolutely the internal forum of belief, whether religious or otherwise, and protects in a qualified manner the manifestation of such belief; subject that is to the state's burden of justifying limitations which are described by law, and are necessary in a democratic society either in the interest of public safety or for the protection of public order, health or morals, or the rights, freedoms of others.

Time at present does not permit me to go into detail; save with respect to one of the cases I mention above that concerning the schoolgirl's wearing the jiljab. That's an all encompassing coat-like Muslim garment. Now, that was in breach of the school uniform policy and the girl was asked not to attend school. The House of Lords, overturning the Court of Appeal, held that there was no breach of Article Nine on two separate grounds. The majority of law lords, by three to two, held that there had been no interference with the girl's freedom to manifest her religion, because it was a matter of choice which school she went to. The school in question was outside the girl's catchment area, and there were other schools in the neighborhood to which she could go, whose uniform policy would have permitted a jiljab.

Secondly, all of the five law lords were agreed that in any event any interference was justified. The school's uniform policy, which permitted less all encompassing Muslim dress, such as the salwar kameez and the headscarf or Hejaz, have been carefully devised to respect Muslim beliefs, after full consultation with parents and with Muslim organizations, and clerics, and had been made for the legitimate purpose of protecting the rights and freedoms of others. Where Parliament, as it had done, had given to the school itself the power to decide on its own uniform, the courts, said the law lords, should be cautious about saying that the school had got it wrong.

This and the other cases I mentioned demonstrate to my mind that the English courts have taken, on the whole, a broad and liberal view of the rights protected by Article Nine and has sought to find a solution to the dispute before them, in the realm of justification, placing the burden on the state to justify that seeking to find a fair balance in the particular facts of the case, between the demands of the claimant and the interests of all those whom the state represents. This is somewhat different from

much of the Strasbourg case law which often seeks to find a solution by setting comparatively high hurdles for the claimant to jump in order to show an interference with the manifestation of the belief in the first place.

In the matter of female Muslim dress, which has become unfortunately a highly controversial testing ground of more wide-ranging cultural, religious, feminists, and political dispute, Britain's particular solution may be contrasted, for instance, with that of France. In Britain there is no law against the wearing of Muslim dress in state schools. The House of Lords, in effect, said that it is for each school, acting carefully and responsively to choose its own uniform. In France, however, there is a general law, the law of 2004, which prevents the wearing of even the headscarf, the Hejaz, in state schools. Now, that law is justified in France by its policy of *Laicite* or secularism, which goes back to the anti-catechesis (Catholicism) of the revolution. *Laicite* demands total neutrality, even a positive neutrality, in the matters of religion.

The theory is that such neutrality is expressive of and protects the dignity of the individual, allowing for no distinctions on the basis of religion. Its part of what France regards as its global, civilizing mission and the spread of enlightenment values. In Britain, however, despite its established religion news of the French law banning the headscarf was greeted with disbelief. Nevertheless, history is everything. In France, as I understand it, a great majority of Muslims support the law of 2004.

One other aspect of religion where the rule of law regarding the fundamental human rights may well be called upon to adjudicate in the near future in Britain, is free speech, both in favor of and against religion. Muslim fundamentalists who call on adherence to kill in support of their religious ideals have been prosecuted. The Terrorism Act of 2006 makes it a crime to glorify terrorism. It's a new crime; we don't know very much about it yet. The Racial and Religious Hatred Act of 2006, but not yet in force, makes it a crime to stir up hatred on the grounds of religion, an offense which British Muslims have campaigned to have enacted to protect them from Islamic-phobic attack.

Significantly, of controversial Danish cartoons, which caused offense among Muslims, were not published by any newspaper in Britain, despite wide-spread publication through out European countries. So, the British public, not being able to make an informed judgment about whether the critical issue raised by those cartoons, the need to protect religious sensibilities or the need to protect free speech.

In conclusion, I've spoken about history. National history can be as or more important than principle and there can be a large gulf between principle and practice. Yet, it would be instructive to see how in admittedly extreme circumstances, for that's where nations face the test, they react to the demands of fundamental needs of human rights. During the years of Holocaust fascist Italy, in the face of the Nurnberg laws, saved 87% of its Jews, and fascist Bulgaria saved 100%, as did occupied Denmark. Other countries did less well for all their principles. Therefore, do not look simply at a nation's constitution, for that's its history at practice. Thank you very much. (Applause)

DEAN KEN STARR

Free Exercise Clause

My thanks as well to the Justice and to the Dean in this magnificent conference. From both sides of the Atlantic, we are drawn back some 16 generations to when those tiny ships, which Milord the Chief Justice spoke of last evening, embarked for what turned out to be Jamestown; seeking – we were reminded by that charming ballad – gold but finding disease, as Milord said last evening.

On this side of the Atlantic we are, in these moments of reflection on religious liberty in our cultures, drawn back nine generations to Philadelphia in 1787, the ratification process that promptly ensured quite lively here in this great city. And then the framing, as promised, the American Bill of Rights, as the new government situated for the time being in New York got underway in 1789.

The familiar words that Dean Walsh invited us to recall, '*Congress shall make no law respecting an establishment or a religion, nor prohibiting the free exercise thereof* semicolon.' These

are the first words of the soaring language of the First Amendment. These words about religion seem to dominate the First Amendment. In fact, the words texturally dwarf, in their preferential position, the other foundational liberties of a free society. Americans tend to think of the First Amendment as protecting *freedom of speech* and it does, in very parsimonious language; freedom of the press and it does; freedom to petition the government to redress grievances and so it does, but the text is given over preferentially to religion, more specifically, religious freedom.

Now, perhaps this textural primacy is reflected by the crafts-personship on the floor of the House of Representatives, in particular in August of 1789 in New York, reflected both the attention that had been given this lively subject in the experience of *we the people* in the original and somewhat varied colonial experiments, but also federalism-related concerns that became very intense during the debate over ratification. So what role would Congress play in this sensitive arena?

It was a sensitive arena because – Listen to this voice from London 400 years ago, the Charter of Virginia, April 10, actually 1606, ‘James, by the Grace of God, King of England, Scotland, France, and Ireland – most impressive – defender of *the* faith, etcetera.’ One wonders, what was the ‘etcetera.’ This royal charter contemplated, oh, yes, gold, and as we say, ‘*in them ‘thar hills.*’ But it also contemplated in express terms, and I quote, ‘the propagating of Christian religion to such people as yet live in darkness and miserable ignorance of the true knowledge and worship of God.’ The Royal Charter took a decidedly clear role on matters theological.

The hard intellectual labors of John Milton and his wonderful works on basic human freedoms. John Locke, his essay on toleration, quite influential with our founders. And here on this side of the Atlantic, Roger Williams, without Miltonian elegance, but he sort of got the idea, and others who are still a few decades away. Milton, in particular, seemed to break through a powerful, cultural barrier, by contemplating that peace could prevail within the polity, even with religious pluralism. It had been thought that the face of the prince was the face of all the people, or else all *you-know-what* would break loose.

There had to be, in fact, a long intellectual and cultural journey from the establishments that existed in the individual states, including state establishments that not only survived the revolution but carried on quite vibrantly into the 19th Century, with the last disestablishment occurring in the Commonwealth of Massachusetts in 1833. That disestablishment, I should note, came through the process of what Justice Breyer would lift up as active liberty, a democratic conversation, not through judicial decision making.

After all, the words in the Amendment were ‘*Congress shall make no law*’, and into this cultural and constitutional framework, and in particular with the ratification of the 14th Amendment in the wake of our Civil War, and then its application in this last century to the states, American courts have struggled to define the meaning of the words that I lifted them up at the outset, but they have been especially vexed by the words *free exercise*. Now, happily, Erwin my wonderful friend will talk about the Establishment Clause. There have been, with respect to free exercise, some cheerful points of happy accord. There is agreement that there can be, one could hope, no coercion of beliefs or mandating compulsory practices, either through words, or ceremonies, or symbols, embracing a particular world views, via state or otherwise.

We, on our side of the Atlantic, love the Jacksonian language in *West Virginia Board of Education vs. Barnette*, the flag salute case. In his marvelous language Justice Jackson, who didn’t even go to college, wrote about freedom of the mind, Article IX, the Internal Forum of Belief. *Willie vs. Maynard* from Libertarian New Hampshire, a rather quirky fellow who declined to have the words on his license plate *live free or die*, because it violated his particular theistic world view. And the Supreme Court said he was entitled to cover over the offensive language. *Lee vs. Wiseman*, coercion or compulsion as very generously interpreted so as to forbid state sponsored prayer at graduation ceremonies, a sort of hybrid establishment clause, free exercise concern.

Second, the principle of equality – so basic to democratic values – informs the question of what forms of religious expression more generally is protected; the intersection, as it were, of our

Equal Protection Clause of the 14th Amendment, and the equal protection component of the Due Process Clause of the Fifth Amendment, and the Exercise of Religion Clause. *Lands Chapel*, an evangelical group in Long Island that was permitted, by unanimous vote of the Supreme Court, to have equal access to the town facilities in order to display James Dodson focus on family films for religious expression.

Third, ecclesiastical freedom; a baseline presumption that religious organizations, whatever they are, enjoy with special force the right to govern themselves, and any limits on self-governance by the religious community requires a very special stepped up justification.

With that said and in closing, Free Exercise has been oddly one of the rather weaker rights in the constitutional pantheon. This has been seen most powerfully in the 40-year-old judicial debate over the exemption forcing nature of the Free Exercise Clause. Are exemptions or exceptions to generally applicable laws required when an assertion is made, without the governmental rule or regulation trenches on individual liberty? One might tend to think so quite naturally given the breadth of the language of the clause, but one would be quite wrong.

Ask Air Force Captain Sinn Chan Goldman, who was simply seeking to wear unobtrusively his Yamaka on his active duty in the Air Force, and was told by the Air Force and then by the courts, no. Native Americans seeking an exemption from state law so as to carry on their traditional, indeed, ancient rights which involved the use of peyote.

Dean Smolla, yesterday, in his afternoon forum quoted from *Active Liberty*, and as to this area of division there has been quite a lively conversation among the branches of our separated system of power, with the political branches being much more vigorously protective of Free Exercise values than the more parsimonious, as it were, Article III branch, the courts. Congress, in a word, *adores* free exercise and so do presidents regardless of their political party.

When it enacted the felicitously named Religious Freedom Restoration, Congress was very, very happy to give a lesson in Constitutional Law to the Supreme Court of the United States, seeking

to restore a test that was very protective of Free Exercise. The Supreme Court of the United States struck it down as unconstitutional.

We are here in the city of the great Chief Justice, John Marshall. It is emphatically the province of the Judicial Department to say what the law is, *Marbury vs. Madison*, and the Court had a decidedly different and much more narrow view of the meaning of free exercise. Congress had exceeded its powers, ironically, almost in a twist on *Marbury vs. Madison*. A fear, it would appear, on the part of the judiciary of ad hoc judicial creation of exemptions, interstitial legislation as it were, of general laws of general applicability. This is not business in which the judiciary seemed to want to engage. And so it was that the court won.

But at every turn, one looks over this 40 year conversation and Congress and the president, regardless of party, respond in a very, very firm way, *we want free exercise of religion*. It puts one in mind, culturally then, of the views expressed by the decidedly non-orthodoxed, and as far as we know, non-observant William Orville Douglas to write in *Zorack vs. Clausen*, and perhaps this is our enduring lesson on this side of the Atlantic, *we are a religious people whose institutions presuppose the existence of a supreme being*. Thank you. (Applause)

PROFESSOR ERWIN CHEMERINSKY

The Establishment Clause

I, too, congratulate Justice Lemons and Dean Smolla on this wonderful conference. It's really a pleasure and a privilege to be a part of it.

From the earliest days, people came here to avoid religious persecution. We know that many came to the colonies for that reason. It continued that way throughout American history. My grandparents came here, in the 20th century, to avoid the **programs/guns** of Eastern Europe, and Nazi persecution and genocide. We know that today people come from throughout the world to avoid fundamentalism, to have religious freedom.

It is not surprising, then, given this history that the framers of the Constitution wanted there to be a secular government. They did not want to have an official government church in this nation. More generally, they thought of themselves as children of the enlightenment, where reason had replaced religion, as a basis for decision. Thomas Jefferson believed that members of the clergy should not be able to hold government office. He spoke elegantly of the need for a wall to separate church and state, a wall that is high and impregnable. I think that that metaphor, *a wall separating church and state*, captures what the Establishment Clause of the First Amendment is about.

Separation of church and state means that our government should be secular. The place for religion should be in the private realm, in our homes, our churches, our synagogues, our mosques, our daily lives. But religion should not permeate government and government should not give significant aid to religion.

This view of the Establishment Clause is very disputed. Even the history that I began with is disputed. There is today, as there has long been, a major debate over whether or not we should have a secular government. Not long ago, and not very far from here, the president of a major state university gendered a major controversy, who decided to take a large cross out of the chapel. I was saddened, but not surprised over this controversy. A couple of years I argued a case in the United States Supreme Court where I challenged the constitutionality of a six foot high, three foot wide Ten Commandments monument that sits directly at the corner near the Texas State Capitol, in the Texas Supreme Court.

In the few days leading up to the oral argument, as the media was covering the case, I received literally dozens of hate messages; some quite vicious, some by email, some by phone, some by letter, and I don't believe that the people that were sending me the hate mail wanted the Ten Commandments on the Texas State Capitol grounds because of the historical significance. They deeply wanted a profoundly religious message at the seat of their government. After all, the Chief Justice of Alabama, Roy Moore, ultimately left office because he wanted a two and a half ton monument with the Ten Commandments inscribed on it at the seat of the judicial system in Alabama. I think, that Roy Moore,

that those who sent me the hate messages, that those who opposed with President Gene Nichols at William and Mary did, are misguided. I believe that Thomas Jefferson got it right; there should be a wall that separates church and state.

I would like to use my few minutes up here to try to explain why. There are several reasons why I think it so important that our government be secular and that religion be protected in the private realm. One reason why this is important is so we can all feel that it is our government. Justice O'Connor expressed this eloquently. She said, *'The essential purpose of the Establishment Clause is to make sure that none of its use is made to feel like outsiders relative to our government, nor insiders'*.

I don't know if any of you have had the experience that I have of going to a banquet and somebody gives an invocation or benediction that is overtly sectarian, or is a religion different from yours. I immediately feel that I don't belong there, that I am an outsider. The same is true if our government becomes aligned with religion. Then those who are of different religion, or of no religion, are very much meant to feel as outsiders.

When I argued the Ten Commandments case to the Supreme Court almost exactly two years ago, Justice Kennedy said, *'Why can't people who don't like it just avert their eyes'?* My response was, *'That has no stopping point.'* By that view then a city hall could have a large cross atop its roof and all it says is, *'Well, if you don't like it avert your eyes.'* But if there is a large cross atop the city hall then all the world religions whose cross isn't a symbol, all who have no religion, will feel it's not really their government.

When there is prayer in schools then all who have religions that don't believe in prayer, or in that particular prayer, are made to feel as outsiders. So long as our government is secular we can all feel that it's our government, and that's the essential purpose of the First Amendment.

There is a second reason why I feel that we need to separate church and state, and that is to make sure that none of us are taxed to support religions that we don't believe in. James Madison

strongly opposed a tax here in Virginia to support a state church. He said it was immoral – that was his word – immoral to tax people to support religions that they don't believe in. I think that James Madison got it exactly right.

There are religions that teach that *my* religion is a path to hell. It's their right to teach that. It's their right to believe it. People can believe anything they want in the name of their religion. Doesn't mean that they can necessarily act on their religious belief, but they can believe it. But surely I shouldn't have to pay taxes to support that religion. There are religions that believe in race discrimination, religions that believe in religious persecution; they can believe it, but my tax dollar shouldn't have to go to support it. Separation of church and state accomplished that. It limits the ability of government to give aid to religion, any religion, to make sure none of us is forced to subsidized religions we don't believe in.

The third reason that we separate church and state is to protect religion. Roger Williams, whom Dean Starr invoked, supported the Establishment Clause not so much to safeguard the state from the church, but to protect the church from the state. The reality is, the more that government becomes enmeshed with religion the more that government is going to be regulating religion. The government is giving money to religion; surely the government can then monitor how the money is spent and what it is used for. The more the government is involved with religious activity, the more religion is in danger.

There is a fourth reason why we separate church and state, and that's to protect us against coercion. I believe, as the other speakers have said, that a unifying principle of the First Amendment is freedom of conscious. I think that's what the religion clauses are about, I think that's what the speech clauses are about. I think that's what the press and assembly clauses of the First Amendment are about. But if we are coerced we can no longer really have that same freedom of conscious. I think that's what Justice Jackson was talking about in his eloquent opinion, West Virginia Board of

Education vs. Barnette where he said, '*There is no orthodoxy that can be prescribed by the government.*'

I think this is why the Supreme Court has been so persistent that religion should play no part in public schools, because when religion is there coercion is inevitable. When there is prayer, even voluntary prayer, children feel pressured to participate. I saw this very graphically and very personally a few years ago. My youngest child was in kindergarten in Los Angeles public school. She came home at the beginning of the second week of kindergarten, and she showed her mom and me how she learned to recite the Pledge of Allegiance, and she did so for us. And my wife, who is also a law officer said, 'Well, I thought the Federal Court Appeals said that children don't have to say under God in the Pledge of Allegiance.' My daughter overheard this and said, 'Oh yes you do or you get sent to the principle's office.' Now, that's *not* what her teacher told her but what she internalized in her first two weeks of kindergarten is you do what the teacher says or the punishment is you go to the principle's office, and the teacher said you recite the Pledge of Allegiance, including the words *under God*.

Now for those who believe in God there's no problem with saying under God. But for those who don't believe in God, for those who have religions who don't have a theistic god, then it is deeply offense to say *under God*; just as it would be for people who do believe in God to have to recite a pledge that says, '*one nation under no God.*' My point here is when you bring religion in inevitably then there is coercion. What's sacrificed is freedom of conscious.

In 1947, in a case called Everson vs. Board of Education, the Supreme Court said that the Establishment Clause *applies* to state and local governments, even though its literal language is about Congress. That's because the Supreme Court said that the Establishment Clause is essential to ordered liberty. All nine justices who were on the Supreme Court when Everson was decided subscribed to the idea that the Establishment Clause is about erecting a wall to separate church and state. Today on the Supreme Court there are probably only three justices who believe that there is a wall that separates

church and state: Justices John Paul Stevens, David Souter and Ruth Bader Ginsburg. There may very well be a majority of justices willing to abandon much of an Establishment Clause at all. There may very well be a majority who will take the position that the government violates the Establishment Clause **only that** literally establishes a church or coerces religious participation. And if that is the view that comes to prevail on the Supreme Court then there won't be much of an Establishment Clause.

But as you evaluate that possibility, I end by leaving you with the words of Justice O'Connor in the cases involving the Ten Commandments a couple of years ago. She talked about how well the Establishment Clause has served this country every since 1791. She said, '*Why would we want to trade a system that has worked so well here for so long, that has worked so poorly in other parts of the world so often*'? Thank you. (Applause)

DISCS #5:

April 11, 2007

University of Richmond

Religious Freedom and the Rule of Law – Continues; Q & A

Disc opens with Judge Spencer already talking.

JUDGE JAMES SPENCER

Free Exercise and Establishment Issues

We cannot be sure, but I am satisfied that the drafters of the First Amendment would be pleased that the issues surrounding the Free Exercise and Non-Establishment language are still being hotly debated almost 216 years later, because it means that their answer to a very difficult problem has turned out to be pure genius. Experientially, what the drafters knew and understood is this: The established state-sponsored church could become dictatorial, corrupt, unyielding, arrogant and intolerant. Many of these drafters, their family members, and their immediate ancestors, had experienced persecution because they would not

conform to or accept the tenants of the established church. At the same time they wanted to make sure that religions, even minority ones, would be free to practice their religion as they saw fit.

So on the one hand, the government is constitutionally bound to withstand what I am sure would be a huge temptation to establish a state-sponsored or sanctioned church. And then, on the other hand, the very same government would be constitutionally required to support religions by guarding against any interference with the free exercise of the same. It is my thesis that this creative tension between the Establishment Clause and the Free Exercise Clause was intentional. The importance of it for the wellbeing and longevity of the Republic can't be overstated.

Why is it so important? Well, I've had the opportunity to study comparative religions and the history of religion. If you look at all of the world's religions, great and small, you will discover that the seeds of intolerance are present in every religion. All religions are faith based; that is at some point in all religions – you must believe something that you cannot affirm by your senses, or by scientific analyses. So a level of moral certainty, certitude is a constituent element faith. All religions claim that their way to salvation – after life, affirmation, Nirvana, enlightenment, heaven, whatever you want to call it – there way is the only way and the right way.

So, what do you do with the others? This is a universal problem of humanity – what do you do with the *others*, those who do not believe as you believe. And what has history taught us? History has given us a very clear answer about what human beings do about the *others*:

- First, they try to convert them. They try to convert them by persuasion or by force. That's our history.
- Second, if they can't convert them then they label them, heretic, heathen, pagan, infidel, lost soul; you give a label to it.
- Third they demonize them. They are bad, they are evil, they are in league with the devil, and they are hard-hearted and hard-headed; you demonize them.

- The final step is you destroy them; you engage them in actual combat, life and death; you destroy them.

So these men, who would no doubt have described themselves as religious, the drafters of this language, wanted to keep religion in check. I firmly believe that free exercise – ensuring morality and tolerance; the non-establishment protecting against persecution and the tyranny of the majority. Maybe I'm giving them more credit than they deserve, but I have always believed that it was intentional and it is genius. It has kept this republic from falling, as so many other places have, into sectarian conflict and are being overwhelmed and being the victims of tyranny by a majority.

Now, I wasn't supposed to talk about that. I was supposed to talk about the cases that are bubbling up now (laughter), but it has some – Knowing the size of this debate, I thought it was important that we understand that. Now, just a few words about the kinds of cases we see at the trial level involving this creative tension, and sometimes the clash of the very ideas. I have three cases that I'll talk about just briefly.

The first one is *Turner vs. the City Council of Fredericksburg*. Mr. Turner is an elected member of the city council and he is also an ordained Christian minister. The City Council had a long-standing policy that allowed its legislative sessions, the council meetings, to be opened with a non-sectarian prayer, given by a member of the City Council. The Mayor would call on a member to say the prayer. So the responsibility was rotated among the members of the City Council. The reason of the non-sectarian prayer policy was to avoid running afoul of the Establishment Clause.

When Reverend Turner came on the council he refused to do a non-sectarian prayer and would only pray in the name of Jesus. After receiving complaints of Reverend Turner's in-the-name-of-Jesus prayers, the mayor asked Reverend Turner if he would please abide by the non-sectarian prayer rule and Reverend Turner refused. So, the mayor stopped calling on Reverend Turner to offer the opening prayer. Seemed like a pretty simple solution (Laughter) Reverend Turner sued, claiming violations of his free speech, free exercise and equal protection rights. Reverend Turner was represented by an organization – I think their

notion is to help those they see as having problems in the arena of religion. The case was tried and summary judgments and motions were heard and this was in front of me. And the resolution was as follows, it was rather simple for me) legislative prayer is government speech; the City Council's regulation of its own speech is not only permissible but required by the Establishment Clause.

The next case and you probably read about this, a navy chaplain, Clingingsmith, and he Sued Donald Winters, Secretary of the Navy. And what this case is about, Chaplain Clingingsmith is a Christian minister. The Navy has a policy that in your worship service, you can pray and do as your tradition requires. The reason being, people come voluntarily to your worship service and if they don't want to hear what you have to say they don't have to come. But if there are circumstances where everybody is compelled to be in a particular place, and it calls for ministering to the group, they wanted their chaplains to provide non-sectarian prayer and a non-sectarian service or ministry. Chaplain Clingingsmith disagreed with this policy. He refused to abide by it and he was disciplined, and with the help of another organization they created a level of protest about this, and there was a protest in front of the White House and that there was another protest was coming up.

Chaplain Clingingsmith's commanding officer ordered him not to wear his uniform. He could go to the protest, you can say whatever you wanted to say but don't wear your uniform. Chaplain Clingingsmith wore his uniform to the protest, handed out stuff to the press and did what he wanted to do. He then was to be punished at Article 15, non-judicial punishment; he refused that and demanded a court marshaled. He was court marshaled and found guilty. He filed suit in the D.C. District Court claiming violation of his rights, freedom of speech, free exercise. And I thought this was interesting, he claimed that the Navy was establishing a non-sectarian, civic religion. That was a part of his claim and he also sought an injunctive relief to keep them from kicking him out of the Navy. He got preliminary relief, but somewhere down the road his complaint failed and he has been removed from the Navy. Now, he is, apparently, quite a celebrity to some. It seems to me that – well, I won't do that (Laughter) I'll just lay it out there.

And the final thing, there was a case *Simpson vs. the Chesterfield County Board of Supervisors*. This involved another situation where the Chesterfield County Board of Supervisors instituted a policy under which its meetings would include a non-sectarian religious invocation. Pursuant to this policy, the Board invited religious leaders from various congregations within the county to provide the invocations. They had folks from all types of religious traditions, Christian, Islamic Jehovah's Witness, Mormon, and other independent places of worship. In August of 2002, Cynthia Simpson, a resident of Chesterfield County, contacted the Board and requested to be invited to participate and allowed to provide the invocation for the Board. Ms. Simpson was a leader of a local witch group. The name of the group was the Broom Riders of America (Laughter)

The Chesterfield County Attorney responded to the request indicating that Chesterfield's non-sectarian invocations are traditionally made to a divinity that is consistent with the Judeo Christian tradition. Ms. Simpson was ineligible to provide the invocation. She filed suit in my district, not my case (laughter), claiming that the county had violated the Establishment Clause by impermissibly advancing Judeo Christian religion. The District Court found that the county had, indeed, violated the Establishment Clause. The Fourth Circuit, a unanimous panel, reversed and remanded the case with directions that the plaintiff's complaint be dismissed. They went on and on about the long history of legislative prayer, the fact that they had a lot of diversity within, and they had a right to control who and how their prayers were delivered.

As you can see, I suspect that long after you and I are gone from this earth, people will still be debating this issue hotly. And as far as I'm concerned, that's a good thing. (Applause)

AMBASSADOR ROBERT SEIPLE

**International Religious Freedom Act of 1998 and Religious Liberty in
Countries Other Than Great Britain and America**

Ah, the awesome power of the last word (Laughter) I knew I was in the right place this morning. I walked through that door; I hit that little lip that sticks out separating the various benches. I tripped on it, almost fell. Three lawyers came up and gave me their – (Laughter)

In 1657 a country yet to be born experienced an extraordinary protest. Thirty townspeople outside of the place that is now known as New York City, protested on behalf of the Quakers and the Quakers ability to assemble for religious worship. This was very extraordinary. Certainly at this time it was not very politically correct. They were ahead of their time, before such protests became fashionable, but with all the potential for being on the right side of history. By comparison, in Boston – that intellectual capital of the universe- three Quakers were hung, three had their right ear cut off, one had the letter ‘H’, I guess for heretic, branded on their hand, 31 were dragged through the streets behind ox-drawn carts, being whipped as they traversed the streets of Boston; three percent to Barbados as slaves. And all of this taking place in enlightened Boston.

Peter Stuyvesant, political **vandarme** of New York, was never accused of being enlightened. And to borrow a Washington Irving phrase, *‘he had a countenance sufficient to petrify a millstone.’* (Laughter) Stuyvesant thought Quakers were seducers of people, possessing a *‘spirit of error’* which is to say he was out of step with Dutch Reform theology. So with extraordinary courage, I think, and extraordinary vision, supported by a free-flowing Biblical stream of consciousness the document that we now know as the ‘Flushing Remonstrance’ was born. The Flushing Remonstrance reminded Stuyvesant that God was more sovereign than he was, and that this was *‘a case of conscious between God and our souls.’* Very simply, it was an argument based on the fact that to be distinctively human one needs to have freewill undergirded by a sovereign God and it ultimately carried the day. The Quakers got what they wanted: a place and time and freedom to worship. And this fall we will celebrate the 350th anniversary of that document.

In the intervening years, of course, we beget ourselves the Virginia Statute, the First Amendment, the Bill of Rights, the Constitution, a country, and a freedom to believe or not, woven into the fabric of our legal tradition. The common characteristics in all these steps: vision and courage. This is a country where we can

debate our differences, that's an extraordinary luxury. This is a country where we can absorb shifts in the law without experiencing a common coup d'état. This is a country where we can accommodate freedom from and freedom for and still live within the tension. When it comes to religious freedom this is a country that has more of it than any other country on the face of the earth.

Let me tell you about another protest. In 2004 I was in Gangtok, Laos; ground zero for some of the worse persecution for people of faith in all of Southeast Asia. And we were being briefed, after being hosted, and being briefed by the district official in the town of Gangtok. And the briefing was about religious freedom. He said we don't have a religious freedom problem in Gangtok. We used to, but on a single day we had all the Christians – they were the minority group that created the particular persecution that I am talking about here, or at least absorbed it – on a single day they renounced their faith. They said they didn't want to be Christians anymore. And if you don't want to be Christian any more we don't have any more religious freedom problems.

And by the way, since there are no longer any Christians in this place we no longer have a use for the church as a church so we turned that into an elementary school. On a single day 1,135 people renounced their faith. This is a forced renunciation of faith. This is what you do when fear, coercion comes in, and you are told that you are going to lose your home, you're going to lose your job, your kids can't go to school, and you'll probably be tortured. Your men folk will be taken away, and you perhaps could be disappeared [sic] if you do not sign this document – 1,135 no-more Christians.

When we finished rolling our eye balls, we asked the district official if we could go and see the old church. It was a Sunday afternoon about 2:30 and we got to the church and it was a sturdily built building, a large building for Gangtok. And we started to walk around it, it was all locked up. When we got to the back of the building we heard some familiar sounds coming from the lot next door. And as we looked over to where the sounds were coming from, by golly, there were 60 no-more Christians having a prayer and praise service. All the women who were crying; they knew that this was a staged protest, knowing that we were

coming. This was going to get them into trouble. By the end of the day they could say good bye to their men folk.

In Laos, by the way, they still had wooden stocks in prison. It's not the kind place you want to spend a single night.

We started to walk towards them. As you can imagine, our communist officials who had just been caught in this grand lie, were very embarrassed. I mean, they saw their entire professional careers pass before their eyes. As I walked towards this group the pastor and five of his elders came towards us and each one of them was wearing sack cloth and ashes. I had never seen this before. I walked up to the pastor and asked someone incredulously,

'What in the world are you doing'?

And he said, *'We are the face of persecution.'*

'Do they let you teach, preach, carry on your faith'?

'Well, they don't want me to preach.'

'What do you do'?

'I told them this. If you want me to stop preaching you will have to put a bullet inside of my brain.'

I finally asked him, *'What would you like us to do'?*

And he said, *'We want you to have just as much courage as we have. And when you go back, when you go back into the international community, you tell the international community that there is a church, there is faith, there is worship going on in Gangtok. Let the world know.'*

Later, as we were driving back to the provincial capitol, Savannakhet province, the town is Savannakhet, I was riding with the governor. I was banging away at this guy because I knew that by the end of the day they were going to really do these folks in. I said,

'You cannot do that. You cannot harm a hair on their head. You cannot begin to think about punishing these people. If you do, we will have the entire international community come down on you. We will take away your trade privileges. We will bring down fire and brimstone.'

I mean I was really – My ego was writing checks that reality could never hope to cash (Laughter)

They got us an audience with the governor the next day. As we talked with the governor we had a plan in mind. I said to the governor of the province, I said, *'Let us go back, raise the money from North America and build you a brand new school, and then you give the church back to the Christians.'* Everyone wins. Face is saved. Well, it took us about six months, a lot of negotiations, and some of it with the prime minister himself and the foreign minister, but finally they gave that church back. We were back there a couple of months ago and I ask some of the people who were a part of the protest, did they ever punish you? Not a hair on our head. I was touched. A courageous statement was made by that band of no-more Christians, and had a profound impact on Laos.

Laos needed a statement. Laos doesn't have a Jefferson. There is no Madison in the cast of religious heroes. In fact, in the government there are no religious heroes in Laos. There is no legal framework; there is no legal history; there is no legal tradition. Laos only has a total of 63 laws for the entire country, for everything, which is to say there is no settled law. Certainly there is only a rudimentary rule of law. They're just people with an inherent sense of justice, who want their spiritual identities protected, they want to be free.

Two protests, separated by about 350 years, held together by a common need, humanly felt, courageously implemented and from which we get two very exquisite gifts. And the gift from America – I think, the best thing we have to offer is the gift of religious freedom. We worked on it for over 200 years. We didn't always get it right, but what we have is good today, in spite of all the discussions, is good today - our best gift to the rest of the world. What we get from Laos and countries like Laos, also an exquisite gift, namely, the admonition to never, ever take religious freedom for granted. Thank you. (Applause)

MODERATOR BOB: Wow, what a great panel. We have 12 minutes left, because I know Rod will keep the trains running on time, and I'll get the hook in 12 minutes. But I promised the panelists that before we go to the audience, and I do want to go to the audience, I'd give those who went before a chance to comment on anything after.

Is there anybody who wants to comment at this point?

LORD JUSTICE RIX: Well, I'd just like to say this, the trouble with religion, as Ambassador Seiple said, is that there is a seed of overwhelming certainty, but I would also like to say that my idea of religion is to stress that – no cleric would agree with me – skepticism; not in a sense of lack of faith but in constant questioning of what you are up to. It has always puzzled me that people of faith, who presumably believe in a world view or a single, universal God, seeks to divide up the world into us and them, or them and us. So, I am a great believer in skepticism and the asking – by which I mean the asking of questions. Perhaps I am too typical a lawyer. Questions like _____ and all the earth do right. That's a very healthy way of looking at religion and its freedom.

MODERATOR BOB: Other panelists. Ken. (Laughter) It was predicted that Ken would talk, I think.

DEAN STARR: I'll be very brief. Two points, one of history, especially in light of Erwin's beautiful presentation, but I think it is an incomplete presentation, with all do respect to Erwin's rendition and learning. Let me summon to the witness stand that very first Congress which fashioned the Bill of Rights, including obviously the religion clauses. The eighth law passed by the House of Representatives was a reenactment of the Northwest Ordinance of 1787. The Northwest Ordinance of 1789, like the 1787 version, began with the words, "*religion, morality, and knowledge necessary to good government.*" In his first inaugural, our first inauguration of the president, it was General Washington of Mt. Vernon and Fredericksburg, who lifted up – and I commend to especially our British visitors – that lovely and fairly short inaugural address, where he kept lifting up the values of divine providence and the importance of providence in the affairs of persons, and now a second and contemporaneous point.

In the very case involving the constitutionality of the Pledge of Allegiance and the addition of the words ‘*under God*,’ Justice O’Connor, who fashioned the task, if we call it that, but the concern of the outsider, the person who does feel like an outsider in the community and their equality polity, which is a very, very serious subject, a very serious issue. She, nonetheless, asked Michael Newdow, the challenger, did you take offence – I’m paraphrasing – when we began this gathering of the court with the words that John Marshall of Richmond brought from English tradition and practice into the Supreme Court of the United States, ‘*God save the United States in this honorable court.*’ I have no objection to that at all. Now I was surprised by that answer. But the point that Michael Newdow, I think, making and making fairly effectively, was freedom of conscious, don’t require my child to participate in a ceremony that is violative of the conscious of the parent. That’s freedom of conscious that we have been talking about, which is in fact, bedrock. But at the same time I think Justice O’Connor was essentially saying, can’t the nation honor its own traditions just so long as it scrupulously abides by freedom of conscious. I think that is getting at resolving the tension that Judge Spencer has beautifully lifted up.

MODERATOR BOB (?): Anyone else from the panel? We have mikes for questions and comments from the floor, and seven minutes to go. This can’t be a group of barristers and trial lawyers and judges.

AUDIENCE: Good morning. I want to thank you all for coming and speaking to us this afternoon. My question is in regard to Professor Chemerinsky’s invocation of Jefferson’s phrase, ‘*high wall of separation between church and state.*’ Taking that into consideration, how do you account for the obvious references to religion that we have today? As Dean Starr pointed out, ‘*God save this honorable court,*’ and the Constitution, ‘*the year of our Lord,*’ Congress passed the act that created the pledge of allegiance that contains the phrase ‘*one nation under God.*’ If that is a high wall of separation, how do you juxtapose or equate that with the conflict that exists by these sorts of things?

PROFESSOR CHEMERINSKY: There have long been conflicting views and tensions about the role of religion. There has never been unanimity about it, and so you could have Thomas Jefferson simultaneously saying there should be a wall that separates church and state, and many who believed that

at the time, and also the kinds of things that Dean Starr says are going on. So, to me, it's just a reflection of the reality that there has always been conflicting impulses in our country.

Now, with regards to your specifics, the words *under God* were added to the Pledge of Allegiance in 1954. They weren't part of the Pledge of Allegiance earlier; they were added to the Pledge of Allegiance because we were fighting godless communism so we should proclaim our own religious nation or nature. My concern isn't about under God and the Pledge of Allegiance generally, as much as it is having children feel that they have to say it in schools.

There is on our money the phrase *In God We Trust*. I always tell my students, if that bothers them I'm glad to take problem off their hands (Laughter) The Supreme Court does begin sessions with the words *God Save This Honorable Court*. Now, to me, all of this points to the very conflict that I am talking about, the conflicting impulses we have about the role with regard of *religion and our society*. I do, though, see a difference between under God in the Pledge of Allegiance in public schools, or the words on the money, or the words *God Save This Honorable Court*. No one has to say *In God We Trust* when they spend money. No one has to utter the words *God Save This Honorable Court* in order to argue before the Supreme Court. But children do feel pressure to say *under God* in public schools and it is that pressure that bothers me. But I don't mean in anything that I said that it all looks in one direction. There have long been conflicting impulses.

MODERATOR BOB: Another question?

JEFF HANNER: Thanks to the panel for being here. My name is Jeff Hanner. I'm a first year law student here. I just have one brief comment, not so much a question, but I did think it was very telling when Judge Spencer was discussing the Simpson case that when he referenced the religion, everyone chuckled, the Broom Riders of America or Virginia. I think that Professor Chemerinski's point; we need to scrupulously protect those in the minority. I'm sure if Ms. Simpson were here she would take umbrage to the laughter. I happen to be a part of a main stream religion, so I don't suffer that similar condescension, perhaps, but just the point that in this debate we reflect on the non-main stream.

MODERATOR BOB: Thank you for your comments, other questions or comments?

AUDIENCE: I want to thank you all for being here, especially those of you who have had to travel so far.

My question is for Lord Justice Rix. You said – and I hope I’m saying this right – that a nation’s history may play a greater role than its laws and its principles. Do you see anyway of bringing a nation closer to its principles, short of violent force or anything closer than revolution.

LORD JUSTICE RIX: **Inaudible** I think one of the great roles **inaudible** by asking people debating issues most important to them, in the calm of the law court, in a balanced and fair way, with the help of fair procedures, that it seems to me that the rule of law, by promoting rationality, will help to bring practice into line with principle. It’s very hard to face the openness of that rational inquiry. I also think that the process of rational discourse, the obligation to justify any interference with freedom of religion that the state seems to impose, also takes the sting out of any necessary, of course, justifiable, interference.

If you’ve had your issue debated and you have explored it all then you may go home, as we all hope litigants do, even losing litigants, you may go home content. That’s not true of all litigants. But it is our general experience with the process of law that allows issues to be resolved successfully even though it may be that one side has to lose.

MODERATOR BOB: One more question.

AUDIENCE: I’m a state trial court judge and I had a bunch of school children ask me an interesting question. I told them the policy in my court, and all judges in my court, if someone does not believe in God they do not have to swear an oath, they simply have to affirm. And a seventh grader said, ‘But doesn’t that mean that they don’t really get punished for not telling the truth’ (Laughter) I was curious if any members of the panel have had any observation on that which I believe is the policy, I believe, in most courts, if they don’t believe in God then they affirm. Just what role does religion play in witnesses who take oaths?

MODERATOR BOB: Judge.

JUDGE SPENCER: Sure. It makes no difference whatsoever in terms of whether or not they can be punished if they fail to tell the truth – (Inaudible due to audience interference and laughter) – I think you are right. In every court that I know of if someone doesn't want to swear an oath they can affirm, and their testimony is accepted like all others. And as they say, if they don't tell the truth they are punished like all others. What happens between them and master, I have no idea (Laughter)

MODERATOR BOB: As moderator I have been given the very nice duty of presenting a gift to all members of the panel and when they got to Virginia from London on those three ships they didn't find the pearls and the gold, but they found diamonds (Laughter) Actually, no, this is a paper weight. I was presented by the founders with this paper weight and by an Associate Dean of the law School, and I said, *'I bet this paperweight has the logo of the University of Richmond Law School on it.'* And she said, *'Oh, no, it has the Jamestown logo on it.'* And I said, *'Well, you're not as shameless as I am'* (Laughter) Then she smiled and said, *'but it does say the University of Richmond School of Law Rule of Law Conference.'* And I present this to our wonderful panel and I thank you all and we will be adjourned for 15 minutes and then be back here. Let's thank this absolutely splendid panel. (Applause)

Law and Displacement of Native Americans

Present: Chief Steve Adkins, Chickhominy Tribe, and member of the Jamestown 400 Committee.

Ken Adams, Upper [Mattaponi](#)

Professor Kevin Gover, University of New Mexico School of Law

Dr. Joseph Shirley, Jr., President of the Navajo Nation

(Disc opens with Dean Smolla in progress.)

MODERATOR DEAN SMOLLA: Indian tribes of Virginia. Steve Adkins is a Chief of the Chickhominy Tribe, and is also a member of the Federal Jamestown Commission. Ken Adams is Chief of the Upper Mattaponi Tribe. They were both among a group of people who came in to visit me at the Law School and stated to my shock, to my embarrassment, that there was not a single law school at that time in the State of Virginia that had as a part of its curriculum a course in American Indian Law. We vowed to change that and we vowed to make the voice of Virginia tribes and the voice of American Indians a prominent one in this conference. As some of you may know, the Virginia tribes are still at this moment locked in a very righteous struggle for federal recognition and all of the rights that that provides. They have a champion here at this Law School on our faculty and among our student body, trying to assist with that.

When we called around the country to get recommendations as to who we might invite to be part of this session there was unanimity that the first person we should call is Kevin Gover, who is a professor at the University of the New Mexico Law School, which has one of the most prominent American Law programs in the United States. He is a very, very highly respected American intellectual on Indian law affairs, but not simply a scholar and a teacher. He is also someone who has dedicated himself to the things that he believes in and to public service. He was one of the most prominent voices within the administration of President Clinton, in regard to matters germane to American Indians.

After Kevin, we'll have the great pleasure of hearing from President Joe Shirley, President of the Navaho Nation. I'll have more to say about President Shirley when I invite him to the podium. Kevin, welcome, we're looking forward to hearing from you.

PROFESSOR GOVER: Thank you very much for that kind introduction. I can only say that if there was unanimity as to my selection, Dean Smolla must not have called very many people (Laughter) Be that as it may, it is an honor to be here and to speak to such an august body of lawyers. And I love Virginia in the spring, so it is really a pleasure to be here.

Obviously there is not enough time to really delve deeply the way law to do, into the philosophical issues of the rule of law, but let me just say a couple of things as background and give you some examples of the point I'm trying to make.

First, it is important to note that every taking, every dispossession, every displacement of Indians over time had a law to support it. It might have been a treaty, whether the treaty was entered into under coercive circumstances or not. It might have been a statute and the statutes were unilateral and imposed by the United States. It sort of begs the question, was there a rule of law of law in the displacement of Native Americans? The rule of law means many things to many people. I know you had a bunch of really phenomenal legal minds discussing it yesterday. But I think there are a few things that we call pull out of it that we can agree upon.

- First, a system committed to rule of law certainly stands against the expansive and unbridled power of government.
- Second, a rule of law system seeks virtue in constancy and stability over time in the law.
- Third, a system committed to the rule of law seeks congruence between the rules and the actions of governmental officials.
- Finally, a system committed to the rule of law wants to provide access to impartial forums.

Now, I suppose it will come as no surprise to any of you that Indians tend to have very little confidence in the notion of rule of law. Law has been used very much as a weapon, a tool – for a more neutral phase – for the dispossession of Indians. So it should come as no surprise that Indians are not fond of law. Let’s talk first about the old cases.

Johnson vs. M’Intosh (pronounced McIntosh): This is sort of the original sin, if you will, in American law towards American Indians. What it basically says is that Indians cannot own property, and Indian tribes can own property in the same way that the other nations of the world do. Now, Chief Justice Marshall went to great lengths in a very learned opinion, discussing how America had inherited this system. In other words, America wasn’t the first to come upon it, but, rather, the European sovereigns had to find a way of dividing up the New World and to avoid warfare among themselves; but that world necessarily diminished the rights that the Indians certainly understood themselves to have under that point. That doctrine was called the Doctrine of Discovery. Now, note, Marshall was not – well, he was, he ended up being an apologist for this system. But he said it’s not really our place to question this at this point. So the court does not take any sort of moral analyses of whether or not it is okay to treat Indian property rights as being different as those of other nations. This is an ongoing theme with Indian law; the court simply backs a way from those sorts of difficult questions. With observations like *conquest gives a title which the courts of the conqueror cannot deny*. So, that even if the court thinks it’s wrong, the court is saying that we really can’t step in, there is nothing that can be done about it at this point.

There is a phrase that Marshall used quite often in these early cases. We have a nick name for it, ‘*the actual state of things*.’ We call it *Taslot* because it comes up so often in his opinions. The gist, of course, is that law is situational. That there really is no overall binding principle, but rather law must respond to the circumstances that we find. Certainly, none of us would disagree with that as part of an abstract proposition, but I think we would also agree that it is a proposition not to be

called upon at the whim, or in a unilateral way, by a government, and yet we see it show up time and again in Indian law.

Marshall sort of acknowledges that this is somewhat nonsensical, this idea that the property rights of an Indian nation should be different than that of others. He goes to great lengths in the opinion – and I didn't want to bring it all in here – but basically to say that Indians were different and that really the rules that apply to the relations between the European nations could not so easily be transplanted to the New World. Certainly you can see that, again, as an abstract proposition. But Marshall cannot avoid the suggestion, indeed, the outright assertion that the European nations possess a superior civilization, and one that they are entitled to impose upon whatever nation they may come upon in their colonial empire. So, in *Johnson against McIntosh*, the Indian property right is diminished.

Let's remind ourselves that another element of rule of law is access to an impartial forum. Here, the Cherokee Nation is attempting to resist removal to my home state, Oklahoma. They brought a suit in the Supreme Court. The Court ultimately said we don't have jurisdiction over this matter, which also meant no court did. So, there was no place for the Cherokee Nation to bring their case. But, unfortunately, the court went on to sort of opine as to matters over matters it said it had no jurisdiction. One of them was to say that the tribes may more correctly be denominated, '*domestic dependent nations*.' The impact of that was to remove Indians and Indian nations from national rules that otherwise would apply, and to make it a matter of domestic concern.

It has two affects. One, it leaves the issue of what Indian rights are to domestic forums, obviously, and to domestic rules. So let's just say that that is a rather extraordinary home court advantage that the court awarded itself in examining what the nature of Indian rights were. The court said, '*Whatever rights the Cherokee Nation might have they cannot be asserted here. And if it is true that wrongs have been inflicted this is not the tribunal which can redress the past or prevent the future.*' So access to an impartial system of justice was denied the Cherokees.

A year later we sort of see Marshall – I call it Marshall’s Lament – in the *Worster* case. Another element of law is that the government’s conduct shall apply to the rules of law that the system establishes. Samuel *Worster* was a Baptist missionary working among Cherokees. Georgia passed laws saying it is prohibited for any white people to be among the Cherokees. Now, up to this point it was generally understood that the Federal government had the exclusive authority to enter into relations with the Indian tribes. Georgia found that unsatisfactory because citizens of Georgia had discovered gold in the Cherokee country. So it was quite important to Georgia to displace the Cherokees in order to expand their wealth and their empire.

Marshall starts off saying, again, *‘It’s difficult to comprehend how people can come from someplace else and say what the rules are going to be and claimed to have discovered a world that was already inhabited.’* But then he says, *‘but power, war, conquests, gives rights which after possession are conceded by the world.’* And then in the famous phrase, *‘We proceed then to the actual state of things.’* That, by the way, is always a red flag if you see it in one of your cases. Interestingly enough, the court goes on to establish some rules that actually are quite favorable to the tribes and to their status within domestic law. That is that they are distinct, independent political communities, retaining their original rights.

The court points out that the very fact that the United States entered into treaties makes it clear that Indian nations are, in fact, nations. He also points out – and this is one of the places where Marshall is rather selective in his invocation of international law – but he points out that the leading scholar of the time *Betel* made clear, as did all the international law scholars, that a weaker power could bring itself under the protection of a stronger power, without ceding its right to self government, without ceding its status as a state. And Marshall made that point in *Worster*, saying that, *‘These words are words of our own selection, and they are to be applied to the Indians in the same sense that they are applied to the other nations of the earth.’* By holding the Cherokee

Nation as a distinct community occupying its own territory in which the laws of Georgia can have no force.

Another element of the rule of law is that government's conduct shall conform to the rules of law that the system establishes. In this particular case, notwithstanding the judgment of the Supreme Court, Samuel Worsted remained in prison in Georgia State – I forget for exactly how long – but the State of Georgia refused to acknowledge the rule laid down by the Supreme Court, refused to say the Supreme Court could tell it to do anything. President Jackson is rumored to have said, *'Marshall has made his decision, let him enforce it.'* The newer scholars of the period say, *'Nah, he didn't really say that,'* but that was certainly his attitude. I can live with that. But quite clearly the system did not enforce the rule of law that it imposed, even as it was making rules that clearly very much favored the interests of the United States over the interests of the Indians.

The rule of law also requires that government not exercise power, arbitrarily power. By the end of the 19th Century the government was exerting the most extraordinary range of power over the internal matters of the tribe. They justified it in this way – I consider Cagama the Indian Dred Scott decision **of the day** (guessed, silence) because so many negative consequences arose from it – *'The Indian tribes are the wards of the nation, they are communities dependent on the United States, dependent largely for their daily food, from their very weakness and helplessness, so largely due to their dealing with the Federal government with them.'* Happily that's a streak of honesty saying the reason they are weak is because they chose to deal with us. And then they say, *'...there arises a duty of protection – so far so good – and with it the power.'*

Now, if the power is to prevent interlopers from interfering with the affairs of the tribes, certainly that's a power that the United States had and might have exercised. In fact, in all of the treaties where the government guaranteed Indian property rights and said, *'We will prevent others from coming into your country – beginning with the Delaware's during the Revolution, the Cherokees, the five civilized tribes in the early 19th Century, the Sioux Nation in the mid-19th*

Century – the government said we will keep our citizens out of your territory, and yet they never did so. So the element of protection that was offered, that justified this extraordinary power that the United States had, was never used to defend the tribes at this time, but it was used to invade the internal affairs of the tribes on a consistent basis.

Cagama laid the ground work for what we call ‘*plenary power of the United States,*’ and I’ll talk a little bit more about that. The other thing that’s striking about the Cagama case is really the departure of the Court from any notion of rule of law. There simply was no contextual source in the Constitution for the extraordinary power to impose federal criminal laws on these, to this point, still independent tribes. Such a law had just been passed, and the court began looking through the Constitution – you can see it in the opinion – looking through the Constitution to find the source of this Congressional power and they couldn’t. They looked in the Commerce Clause and said no matter what this isn’t about commerce. They looked in the Territory Clause and said no that’s not what it’s about. They looked at the Property Clause. They simply could find no textual source for the authority the United States exerted. And so what do they say? They say, ‘*It must exist in the federal government because it never has existed anywhere else.*’ I don’t know what that is. That’s the theory of relativity turned backwards or something. It must exist because it has never existed anywhere else. Then, more tellingly, ‘*because the theater of its exercise is within the limits of the United States because it has never been denied, and because it alone can enforce its laws on the tribes.*’ The point being that there is no source for this authority. It’s a power that was essentially taken to itself.

Now, when government takes unbridled power, unlimited power; unlimited by any text, you’re asking for trouble, and trouble soon came. The government adopted a policy of coercive assimilation for the tribes. A key element of that was boarding school. This is a group of Apaches arriving at the Carlisle Indian Industrial School in Pennsylvania. Four months later they looked like this; they were literally trying to turn these children from Indians into white people. This is a

Navajo who went to Carlisle and within few months, obviously, I kind of look like that guy I think
(Laughter)

The brain behind the Boarding School policy was this fellow, Richard Henry Pratt. He said, ‘*A great general has said that the only good Indian is a dead one; kill the Indian in him and save the man.*’ It is easy to criticize Pratt for this sort of outlook, and certainly in this day and age we would all look down our noses at him. But it is worth pointing out he was a liberal at the time. He was a humanist, a humanitarian in his era. Really, I think, after reading a lot about him, meant to do good. Yet, you can see that in the absence of rule of law, and a limitation of one nation’s power over another, only abuse can occur.

Another element of the policy was to open up Indian lands to settlement by non-Indians. This is an Oklahoma land rush. This policy was challenged in a case called Lone Wolf vs. Hitchcock. The court found that there was plenary authority over the relations of the Indians, and the power has always been deemed a not political one not subject to be controlled by the Judiciary Department of the Government. In other words, whatever Congress chooses to do it can do and the Supreme Court has no authority to review. They said, now the United States has the power to abrogate treaties, Indian treaties, though it will presumably only do so when the interests of the Indians themselves require it. Of course anytime, Thoreau said, if someone were coming to my house with the express purpose of doing me good, I would run for my life. And the Indians must have felt much the same way, the United States coming in and saying we’re going to help you out here. We’re going to take your land, turn you into farmers, and send your kids to boarding school. You’re going to be the better for it in the end. I suggest you can only get bad results when one people try to tell another people what is good for them.

All of these matters – it doesn’t matter that the agreement were reached by fraud; it doesn’t matter that Congress acted unilaterally against tribal interests; these matters, in any event, were solely the domain of the legislative authority. This is the part – I can sort of get through most of

this opinion without getting too mad because times were what they were – but then to say the action of Congress was a mere change in the form of investment of Indian tribal property strikes me as just, in the words of current generation, as lame. It was not a mere change in the form of investment of Indian tribal policy. It was an absolute, outright, unequivocal effort to destroy these tribes as separate entities.

And lest you think that these were bad times and you think they are over, the week before I was born, the Supreme Court issued an opinion saying that Indian aboriginal title, the title that Marshall discussed in Johnson against *M'Intosh*, may be extinguished, with no compensation whatsoever, and that that is constitutional. Why? Because every American school boy knows that the savage tribes of this continent were deprived of their ancestral ranges by force. And that when the United States chose to pay in blankets, food, and trinkets, it was not a sell but it was rather an act of the generosity of the United States. So this is an attitude not quite as we might like it to be, and so we inherit a system of law governing the rights of Native Americans that has something of an unhappy history, but that's where we are.

Let me leave you with this thought. This is the great Indian law scholar Felix Cohen, he said, really, right about the time of the Teton Decision, that '*The Indian marks the shift from fresh air to poisonous gas in our political atmosphere, and our treatment of Indians, even more than and treatment of other minorities, marks the rise and fall in our democratic faith.*' So with that I'll turn it over to you. (Applause)

MODERATOR DEAN SMOLLA: It is now my honor to introduce to you the Honorable, Joe Shirley, Jr., the President of the Navaho Nation. President Shirley was inaugurated as the President of the Navaho Nation in 2003. He has been engaged in public service for over 37 years. Among his many prominent positions of leadership, he has served as the Chairman of the Ethics and Rules Committee

for the Advisory Council to the President's Commission on Sustainable Communities. He has been the Co-chair of the Bureau of Indian Affairs Total Advisor Council, and Co-chair of the Bureau of Indian Affairs Sovereignty Protection Initiative. He has won many awards, and recognitions, and honorary degrees for his work in the promotion of peace and the promotion of the dignity of the rights of Indians. President Shirley, welcome.

JOE SHIRLEY, President of the Navaho Nation: Good morning, or Good afternoon. Greetings! “Ya ah tae! **Sha has twii, shi zahni, altah asil lhoh, shi tek ihzin nih!**” That is a greeting in my language, the Navaho language; greeting my elderly men first, then my grandmas, my elderly women; and then friends from the afar and near, and then lastly my dear relatives. So this is a greeting from the heart of Navajo land! I want to say ‘Ya ah tae’ to each and every one of you.

I want to express my appreciation for the invitation to be here and to share with you a few thoughts from the heart. I am not an attorney, never have been, and I am not a judge. I understand that we have many judges here, distinguished and honored judges here. Attorneys, some world-renowned attorneys that are represented here, even some from across the big waters. So, I feel very honored to have been invited here to rub shoulders with the dignitaries, the judges, and the attorneys, and the leadership. I just want you to know that.

Let me kind of further shed light on who I am. I am President of the Navajo Nation, the biggest Native American nation in all of North America. We are a little over 300,000 strong. By the number of the people living in the United States is 300 million; we are probably not even a drop in the bucket. But in the world of Native America, we are considered the biggest Native American nation in North America, a little bit over 300,000.

I was born, and raised, and bred, I say, all on Navajo land. My family and I, we live on the doorsteps of the eighth wonder of the world—Canyon de Chelly there at Chinle, Arizona,

northeastern Arizona. I am married and have six children. I have a Masters degree, so I'm a professional social worker; a Masters in Social Work degree from Arizona State University in Tempe, Arizona. That was back in 1978. Recently in 2005, I was blessed with an Honorary Doctorate's Degree from Northern Arizona University in Flagstaff, Arizona. I am very proud of that. That was given for my 37 years of leadership. I take that as a degree from the University of Hard Knocks and I am very proud of it (Laughter)

I have just been reelected President of the Navajo Nation. I have started my second four-year term this year. They tell me that no Navajo Nation Chief or President has been reelected back-to-back for 28 years; I guess we set a little history. I am very proud of the reelection; it was a very sweet victory. As far as my administration, the Shirley Administration, the past four years has been education priority. Education is the number one priority for the Navajo Nation as a people. The second priority is economic development. Actually, what we are trying to do, at least for my administration, is to try to get back to standing on our own two feet. We were once that, way back before the foreigners came across the big waters. We were very independent; we were very fierce, we were very proud, and then the foreigners came across and took that away, and now we are still a dependent people; not by our choosing – but it is just that way.

Sometimes I believe that the U. S. government is very deliberately fostering that dependency, and knowing full well what would bring us to par, you know, with the rest of the world, even here in the states. Knowing that, with that knowledge, we still have an unmet need with the Navajo country alone, upwards of \$600 million dollars. I know that the U.S. government is a super country with billions and billions and billions of dollars out there. And here we are, \$600 million dollars shy of really helping ourselves and it is not being given. But, otherwise, we are trying to do everything we can on our own to get back our independence, to get back to standing on our own. I feel that is just the way it should be in the world, as far as a people and as far as a nation are concerned.

The only real superpower and very sovereign nation that I know of is the U. S. government. The people in the U. S., they have, you know, monies overflowing, and they are sharing it all the time. There are a lot of dependent nations that are out there, you know, outside of the U. S. Here, you know, in the U. S., the Navajo people, and Native Americans, but we are working.

I want to maybe in the next 15 minutes just say some things from the heart, like I said, talking about the rule of law. I want to say something about that, too. I am not an attorney, I am not a judge, but I am the leader of my people, and I've seen and I am seeing what is going on out there in my world. Maybe by sharing myself with you and the plight of my people, as judges and attorneys, as you could look at the laws and coming down with decisions that will change some of the laws that are out there, maybe I can shed a few light on some things, and maybe you can use that to further deliberate as to how some of these cases should be decided, especially in Native America country, in Native America.

Forgive me, I do not want to say anything that will really offend anybody, but like I said, I want to be coming at you from the real world – my world – and to tell you just the way it really is, you know, back in my home country. This is a university setting; we are deliberating, as I understand it, about the rule of law, how it is applied, what it has meant to some people, what it has meant to the U.S. government, to the government of England, and what it might *could* mean to the world out there.

We have a lot of wars going on right now. As far as I know, with the war in the country of Iraq, there are many Native Americans serving over there, including my people. We have lost seven soldiers, two with families. One of my soldier's arms was blown off. But hopefully, by looking at the rule of law and how it is applied here, you know, we might somehow stop some of these wars going on out there, if we can apply it to the world, too.

You know, Mr. Gover has said some things about applying the rule of law, about assimilation and I think the mentality is still there. One of the judges here, Judge Spencer I believe was his

name, Black brother; he said something that really struck me. He said first what you try to do is you try to convince and you try to convert them – I forget what the second and third things that he said to try. But if that doesn't work you do this number three. And if number one through three doesn't work the fourth thing you do is you kill them. I think that is what has been going on. I think today it is still going on. They might not be doing it with guns and bombs and stuff like that, you know, in Native America but it is still going on.

For instance, a couple of weeks ago the acting mayor of Houston came out with a barb, said that, '*Why are we still paying homage or catering to the Native Americans out there? They are a conquered people. We need to get them off of welfare and just assimilate them into the United States.*' Well, why the United States is still *catering* is because they promised that they would do that. It is incorporated in our treaties. To me, the treaty and the promise is the rule of law. Now, the acting mayor of Houston is saying, forget about the rule of law, you know, forget about our word. Let's just assimilate them into the general scheme of things. Well, that is not the Native perspective. The U.S. government, a government, has promised. It is the rule of law to us, and that needs to be honored, that needs to be honored. So, today, even just this side of two weeks, like I said, one of the leaders of one of the great cities saying "Let's just assimilate them, do away with them." I beg to differ that that should not be the case.

Talking about the rule of law, Native America has its own rules of law. Earlier we were talking about separation of state and church. I have a feeling about that and so do Native Americans. Ours we don't separate, ours is holistic. That is just the way we are, and just the way foreign people found us. The earth is our mother and the sky is our father. You know, we have a relationship with the wind, the thunder, the rain, the fowls of the air, and the four-legged beasts. Everything is related to us; we are a part of it and that is our law. And this is given by the holy people. It is what we are still trying to live and trying to live by. But it seems like there is another rule of law that is being applied, you know, to our rule of law, to say that the rule of law being applied to Native

Americans isn't the way it should be. We are civilized and the rule of law by a civilized society is what should rule. This is what is being said.

Of course, what is not really talked about or is not really known – well, it is known but it's just not being really looked at, I guess. Earlier I was asked the question what do you think about sovereignty? Well, we have always had sovereignty. That was the way Native Americans were created, with sovereignty, with independent children of the holy ones. And then somewhere in there we were made dependent.

And then also what is the relationship between Native Americans and Jamestown? Well, I think this is where democracy was born. Natives had democracy. We had a government already when we were “discovered.” They borrowed from the Natives, you know, to draft this Constitution. They were observant. My understanding is they were running away from a dictatorship; they were running away from religious persecution. So, they deserted their government, and when they came here they had no government. Then they observed the Natives with our government and it was a government by democracy; by consent, we still have today in my Navaho world. They borrowed that; put pen to paper and then they drafted the Constitution. We had helped them; we helped to create the U.S. government by helping them draft their U.S. Constitution. That is our contribution. The relationship between Native Americans and Jamestown is that Jamestown, with the Native Americans and Jamestown, this is where democracy was born, using democratic principles already being practiced by Native Americans.

Now, let me say some things about the rule of law as applied to Native Americans, since the government was born. Back home, we have this plight with uranium. The U.S. government came in to dig for uranium and they wanted us to help dig. But we dug without being told the dangers of the uranium ore. It seems that the rule of law is that you are supposed to apprise people of any danger that you subjected them to. But the rule of law was not applied there. As a result, we dug the uranium and then afterwards, we contracted cancer and thousands died because of that.

Thousands today are sick, dying of cancer, bedridden, Navaho people, natives that dig the ore. The rule of law was not applied there.

There is also the desecration of sacred places, talking about the rule of law. Our rule of law, is like I said, is holistic, this given to us by the holy people. That's what we are living, what makes us Navajo. That is where our culture comes from; that is who we are. But then there is a rule of law being applied that says that's devil worship, that is idol worship — no good, heathens. Who says?

Then, also, the rule of law applied to us regarding freezing some of our land, for over forty years, called the Bennett Freeze. Because our land was frozen we could not develop it, we could not build on it. People were driven from it, we lost a lot of our young, a lot of elderly died. Medicine people, people who knew the sacred stories, who knew culture, they died, you know, because of the rule of law.

Then there is the trusteeship. The U.S. government agreed to be our trustee. Mr. Gover brought out that they said we were a dependent people; we needed a trustee. So, they said they were going to be your trustee, and we agreed to it. But, you know, applying the rule of law, seems like we ought to be doing very good, as children, wards of the government, you know, like I said, because our parents are affluent. They have billions. By going into the backyards of Native America, we still have people living without running water, no power, no wastewater disposal systems, no housing. They just live in shacks. So where is the rule of law? Where is the promise, I guess, is where we ask our questions?

We do not have economic development. Because we have no economic development, the crime rate is up. There is drug abuse and gangs are rampant. Alcoholism is killing many of my people. Domestic violence and child abuse are a part of daily living. Cancer, diabetes, and obesity are monstrous, not only on Navajo land, but also throughout Native America. This is the rule of law that the U.S. Government had said they were going to live by. And we continue to ask the question: When?

Another thing I want to share is the culture. There is the killing of Natives, you know, a very slow killing going on today. Like I said, guns and bombs are not used anymore, but rather legislation and the rule of law. For example, in the state of Arizona, they passed this legislation that said “English only.” The Navajo language is no good, the Apache language is no good, you know. In the state schools, the only way the kids are going to be taught is through the English language. We are proving – as the biggest Native American nation in America – we are proving that using our own language is better over the English language, you can really teach a Navajo child. You know what, a Navajo child can learn, can make his or her mark, to be on par with everybody out there. The Navajo language works. Teaching Navajo culture works. But we have this law in the state of Arizona that says English only in the state schools. English Only”if you work for the Arizona state government. They are slowly doing away with us, and that is not good. But, otherwise, as the biggest nation in Native America, we are trying to get back to standing on our own two feet. It looks like the powers that should be helping – when there is limited help or not helping – we are trying to do it on our own.

You know, I really appreciate Chief Justice McGregor coming out to Navajo land the other day. She is here with us today. She brought her court, her judicial proceedings to Navajo land. It was history in the making. One of the reasons being, you know, that when our people break the law they are tried – especially in cases like murder or grand larceny – they are tried in a foreign court where the peers are supposed to be judging, but there are no peers, other than Navaho court judging. If you bring them to Navajo land, like what Chief Justice McGregor has done, we have Navajo jurors there. Our people can be judged by their peers and that’s the rule of law. And I really appreciate Chief Justice McGregor for doing that.

We have the most awful time with our courts. We have a court system, we have a judicial system, we even have what we call a Peacemaker court, which is using our own laws; Navajo laws, laws given to us by the Deities, using that to come to a conflict resolution. Whether it is divorce or

trying to repair a marriage or, child abuse, or talking about property, using our own way, and it is working. But we need the wherewithal to make it work. There are other systems that can be put in place, you know, to get at the rule of law, to get a loan, to get at conflict resolution. I think it behooves the world out there, the judges out there, and the attorneys out there, to look at some of these other ways, some of these other systems. If you apply it, it might could just work, you know. I don't think we are there. We are not just talking about the U.S. government or the government in England. I think we are talking about government powers that are out there in the world. How many countries are out there? How many different peoples are out there?

I am only talking about the Navajo Nation and we have the Peacemaker court. We really want to apply the rule of law but, you know, living here in the states we don't have the wherewithal to have law enforcement personnel enough to really govern our community, to bring down our crime rate. We do not have that. The reason why the crime rate is up, we need police officers and we need detention facilities. We do not even have detention facilities in Navaho land to talk about. We have been crying for help and the help is not there, it is very slow in coming. So, to the best of our ability, we are trying to do it ourselves. So, in talking about the rule of law, if you are going to apply it, you know, there are governments out there, there are people out there; in my case the Navaho people, we need help. We need help, you know, with out courts, with our law enforcement, with our Peacemaker courts.

Then, also, the other ways I think they can help is to reinforce our sovereignty. Sovereignty, to me, is very simple, you know. As an individual person it only means independence, period. You do not need to qualify it. It's just standing on one's own feet. In the scheme of things, in the scheme of the world, bringing it home to the individual person; what is life all about? Life is about standing on your own two feet, as a child of the holy ones. That is all it means, sovereignty. If you are a family and you want to be independent, stand on your own as a family. If you are a community, stand on your own as a community. If you are going to be a nation, stand on your own

as a nation. That is what we are trying to work on. We need help in recognizing that sovereignty; getting back that sovereignty, getting back that independence. If the U.S. government can do that, recognize it and help us, they might not have to dish out so much money to try support us. We could do it ourselves. But we need help.

Another thing that sovereignty means, if afforded, is that we can deal with other powers out there in the world, like we used to deal with once upon a time, with the government of England, government of Spain, Mexico, and China. You know, we need to borrow about \$600 million dollars. I told the U.S. government then *'if you are not going to give us the \$600 million dollars that we need, why don't they just lend it to us?'* To this day we have not gotten that loan yet. Maybe China might, even Mexico might, you know (Laughter) But to do that, we need the recognition of sovereignty in Native America, and they need to reinforce it.

Then the last thing is they need to stop assimilating us, trying to assimilate us. We were created as a people by the Creator – by God, in somebody else's terms, you know – and we want to keep that of our culture, our language, our way of life, and whatever can be done to make that happen, that's what we want. We don't want to be a part of the mainstream, you know. We are who we are, is basically what it amounts to. If that can be recognized we would appreciate that.

The last thing, in closing, I want to say, I want to share a teaching with you. There are many wars in the world today. People dying, grandmas getting shot, and grandpas getting killed, grandchildren getting killed, kids getting killed; bombed, you know, limbs getting blown off. Sometimes I think about it, and why? Why? Like I said, we had a Navajo soldier whose arms had been blown off. Two have been done away with, killed in this war in the country of Iraq.

I was raised by my grandmother and she told me, *"Grandson, I want to teach you something today. Says I want you to go to school and try to learn about the foreign ways, the foreign language, and how to deal with their money; but don't you forget our ways, either. The Creator has created us as a (de net) people. Don't forget our teachings."* *'One of the teachings is,*

Grandson,’ she said, *‘is that that we are all on the same side. If you go to school, maybe one of these days you might get into a leadership position. When you do, I want you to learn this truth and I want you to apply it. We are all on the same side. We are all members of what is called the ‘five-fingered, intelligent, earth-dweller called Homo sapiens, human beings.’* In my language she would say, *‘No cot wa lev ash la e inaudible’* that’s who you are. You are a member of the ‘five-fingered, intelligent, earth-dweller called homosapiens, human beings. We are all on the same side.

We are all on the same side. It does not matter the color, you know, whether you are white, Black, Asian, Hispanic, or Native American. We are all on the same side being that we are all members of the ‘five-fingered, intelligent, earth-dweller called homosapiens, human beings. ‘The real monsters, Grandson, which know no creed, know no color. And it does not say this is a white man, we will spare the white man and we will eat the Native American. It doesn’t say that, it eats everybody. It preys on everybody. These are: the famine, the thirst, the greed, the jealousy, the ignorance, the bigotry, the racism, the apathy, and all manner of diseases.’ These are the real monsters, and we ought to be standing side-by-side making war against these monsters. These are all alive. There are essences out there. It is just that we do not see or know them. The sooner we come to that understanding, maybe the world might be the better for it; you know, there might be fewer wars the sooner we come to that understanding. But because of our lack of understanding, we have all these wars going on out there in the world. My hope is that we do come to an understanding some day. Otherwise, I see the omen, it’s bad. Somewhere in there we’re going to blow ourselves up. And then when we do that, it makes me wonder what will happen to the rule of law.

I think we have come a long ways, coming with the body of law, much like this is something that might could work, you know. And we are like right here today, at this conference, we are exchanging ideas, exchanging notes. You know, what’s working over there, what’s working over

there, and maybe we can do this, do that, and make it work a little better. But, you know, I have the fear. I listen to the news everyday and they are working on this bomb over there, someone else is working on this bomb over here. The U.S. is working on some more over here. What if somebody pushes that red button? I think it's only going to take one, myself. And then that's it. Then where are we going to be? Where is the rule of law going to be? That is my fear. I'm hoping that maybe somewhere in there we get wise and come to believe that we really are all on the same side. Let's stand together and really make war against the real monsters, you know, which is the famine, the racism, the bigotry, the greed, the jealousies, and all manner of diseases that are out there. We don't have any answers for cancer. We should be standing side-by-side, looking for these answers.

Ladies and gentleman, again, I feel very honored to share these thoughts with you. I have come at you from the heart. I have come at you from the real world. I am not an attorney, I am not a judge, but I hope something that I have said at least triggers something in your mind to help us maybe write a better law henceforth. Thank you. (Applause)

QUESTION AND ANSWER

MODERATOR DEAN SMOLLA: We have just a few minutes, and I know there are many, many reactions and questions. So let me try to channel them through the crowd to each of you for just a second. Let me start with, Kevin, first of all. Here we are in Richmond and one of its most famous citizens is John Marshall, whose opinions you were describing. So, imagine that his spirit was brought here back and he were in the room. Imagine for a second that I am the Chief Justice returned, and I listened to the Rule of Law Conference, and I've been very proud of my role as a chief justice who helped create the American conception of the rule of law. Then, I had to watch your painful power point presentation. I am under oath now, you know. If you could ask me

anything you wanted to ask me or make any argument that you wanted to make to me, in light of years of history since then, what would you say?

PROFESSOR GOVER: It wouldn't actually be to change the outcomes the cases that I described, but rather how we got there. The most harmful phrase Marshall ever uses was to say that the relationship between the tribes and the United States is like that of a ward to his guardian, and that the Indians were in a state of pupillage. Marshall did not intend this, but by the end of nineteenth century the responsibility of United States to defend the tribes from outsiders became the responsibility of the United States to protect tribes from themselves. That's the one thing, if I could get him to just take paragraph out of his work that would be the one.

MODERATOR DEAN SMOLLA: Would the consequence of that be some measure genuine of sovereignty in the international sense?

PROFESSOR GOVER: No, that would not be a consequence of that. First of all, remember that it wouldn't matter what the Indians had said at the time if all of the European nations and the United States agreed on what the rules were, and that that is essentially what happened. So it wasn't as though the United States had control over it. They might have said, everybody feel free to come talk to our Indians, but that was unlikely. So, no, it wouldn't have meant that, but I think what it would have meant – Another phrase Marshall used and I wish that he didn't have, is *domestic dependent nations*, because by domesticating the issue by making it a matter of domestic law it gives the United States the unilateral authority to make the rules of the engagement. That was another place I don't think Marshall anticipated what would happen 70 years hence. But it certainly is language that the court at the end of the century was seizing on and that the current court seizes on quite regularly.

MODERATOR DEAN SMOLLA: One final question for you and then I'll have a couple of questions for President Shirley.

As you look back now with all of this hindsight on John Marshall, if you were here yesterday afternoon, we heard our colleagues from the United Kingdom often speak of the conception of rule of law in light of concepts of natural law and natural justice, and in light of the concepts of the light international conscious, the conscious of mankind. Very poignantly in some of those later John Marshall opinions, you, I think, see a person in deep conflict because you see him openly admitting that in the eyes of the creator and in the conscious of mankind the Indians are right, but I must apply the laws of the conqueror? Was that, looking back at it, ultimately a failure to apply the rule of law?

PROFESSOR GOVER: Oh, clearly, one that certainly can't be laid at the feet of John Marshall alone. But what I was trying to get across is that entire sequence of events was a failure of the rule of law because it involved one people imposing its laws on another. I can't imagine a circumstance where that is going to be a way of protecting the rights of a lesser of the two parties, and I think Marshall didn't see that coming. I think he thought more of the United States and thought that it would be a more enlightened policy that was pursue. But, in fact, of course, over time and after the Civil War, policy really deteriorated as the ability of the tribes to fight deteriorated.

MODERATOR DEAN SMOLLA: Thanks. President Shirley, I think that the warmth and the power and the resonance of the Applause for you were very genuine, and reflected a deep empathy in this room for everything you said for your message of peace, and for many of the sad things that you had to share with us.

You are a leader, and so you are not here only to stir our hearts and to speak to our hearts but you are also someone who, as you have said a number of times, hopes to influence our policies. What do you think would be at this stage in history for American Indians, for the Navaho and others, the most enlightened policy? If you could convince a future president, if you could convince the future Congress, if you could convince the American people to focus on this and pay attention, in a few words, what would you have us to do?

PRESIDENT SHIRLEY: I think a recognition of our sovereignty, the working with us of our sovereignty, getting back to giving us back who we were, are, you know. I would say, everywhere I go, you know, I call people like yourself *my brother*. I call you my brother. I call you my brothers and sisters, my grandpas, my grandmas. If that could be acknowledged, that belief, that way of life and then use that to compliment each other. Not so much to say that you are over there and you're over there, you're dependent. And we have all these resources. What can we do to compliment each other? What can we do to help each other and still be who we are, you know? White people, you know, they have a culture and so do Native Americans have a culture, you know. They are different. How can we stay different but at the same time be the one to compliment each other? Get away from these wars and rather help out each other **inaudible**.

MODERATOR DEAN SMOLLA: Well, we could listen to you all afternoon, I'm sure, and that was true of the earlier panel as well. Thank you both, very, very much for your thoughtful remarks and we are adjourned. Please join me in thanking both of them. (Applause)

CHIEF ADKINS: Dean Smolla, one question.

MODERATOR DEAN SMOLLA: I'll indulge you.

CHIEF ADKINS: One observation. When I look back at the laws of Georgia and I look at Kuwait, I see two roughly parallel situations. **inaudible** Georgia, Chickhominy, and the Cherokee People sitting on gold. I see Kuwait sitting on oil. I see the United States rushing to the aid of that sovereign nation Kuwait. Where the parallel stops is no one rushed to aid of the Cherokee to protect them from the laws of Georgia.

MODERATOR DEAN SMOLLA: Thank you, Chief Adkins. (Applause) Folks outside will direct you to the next forum.

Jones Interview / Cutaway Andrew Prozes / Exteriors

This DVD is not coverage of the actual speeches as delivered. Rather it contains an interview of Ms. Elaine Jones, former President, NAACP Legal Defense Fund. Also cutaways of an address by Andrew Prozes and exterior shots of the University of Richmond.

INTERVIEW – ELAIN R. JONES

Question: What lessons can emerging democracies learn from the roots of the democracy established in Jamestown?

MS. JONES: Important that democracies not make the same mistakes that we initially made. We have to learn how to embrace difference and we have to make sure that there is not a disconnect between the rule of law and our practices and our traditions.

Emerging democracies want to avoid civil wars, they don't want that, and the U.S. was very fortunate to come through ours united, you know. So, that's what we want for the world, to benefit from our mistakes. We want them to believe and practice democratic principles, and principles of equality and fairness. It is very important, when people feel that they are part of a system and that their voice matters then your democracy is strengthened.

Question: The civil rights movement was a major step in America's growth and the growth of democratic rule. What do you think is the greatest challenge in the ongoing civil rights movement?

MS. JONES: One thing we must keep in mind is that civil rights were not just a movement began in '50s and '60s. There was also was a civil rights movement during colonial times and post-colonial times. All of the struggle of women to get the right to vote was a civil rights movement that lasted more than a hundred years. Women got the right to vote in the 1920s with the Nineteenth Amendment, and they had been lobbying for the right to vote since Abigail Adams wrote John Adams in 1787 *remember the women*, so it's more than 100 years. And the struggles continue. The African Americans with the help of many Whites come out of slavery. The Whites couldn't

let the world know that they were helping because they would have suffered repercussions. But I often tell people, you know, Black people didn't come out of slavery by ourselves. And I think of the Senator, Charles Sumner, from Massachusetts, who introduced the 14th Amendment in 1868 and he enraged other senators so bad that they caned him on the floor of the Senate. He later died of his injuries. But he is the father of the 14th Amendment. He is not Black. He is White. So, that's a message that is important. All of us who are involved on both sides of these issues, we know the right thing to do and now we must find the will and the courage to do it.

ANDREW PROZES: Break into portion of Mr. Prozes speech. This section of the DVD contains cutaways of Mr. Prozes speech on the Rule of Law in International Business. (Video segments too brief to summarize)

Presentation of Awards, John G. Roberts, Jr. Speech & Award presentation

Present: Mr. John Tacha, General David Kerry, Executive Director American Inns of Court.

JUSTICE DANEAL TACHA: The evening is growing late and we have a big day tomorrow, so I think we will begin. First of all, thanks to the Governor, and a very warm welcome to your state. You have done a marvelous job of hospitality.

I am Daneal Tacha and have the great privilege of serving as the national President of the American Inns of Court Foundation. (Applause) Thank you. Before we begin the evening's program there are two people who are in many ways my partner and I want you to meet both of them. Very, Very often my husband is unable to travel with me because he has his own business and his own life. But tonight my husband and life's partner is here with me. John, would you please stand and be recognized? (Applause) The other partner is of a different sort. He is the Executive Director of the American Inns of Court Foundation, who has in the last two years taken on a very important leadership role for us, at a very import time for the Inns. General David Carrie, would you please stand (Applause).

For me, most events of historical are explained by the confluence of time, place, and shared understanding of compelling circumstances. So it was that those adventurers who reached the shores of Virginia 400 years ago and brought with them a charter that contained the promise that at that time, in this new place, they would enjoy the rights, franchises and privileges that they had enjoyed as English people. They sparked, as Professor Howard reminded us today, a four-century long impulse toward constitutionalism, nation building and understandings of sovereignty. They were responding to a shared understanding of circumstances that has lasted through these four centuries.

So, it is that we have gathered here in nearly that same place 400 years later, to reflect upon that history, to celebrate the achievements, to confront honestly some of the failures, including those displaced and those displayed, and to consider the circumstances of our own time. None, none more compelling and defining and articulating what it is we mean when we declare to the world the centrality of the rule of law to a civilized society.

We are so very grateful to the University Of Richmond School Of Law, the State of Virginia, the Federal Jamestown Commission, and those many sponsors who have made possible this extraordinary moment in history. Would Dean Rod Smolla and Justice Donald Lemons of the Virginia Supreme Court please stand and let's thank the University of Richmond and the Virginia Supreme Court. (Applause)

What truly made this event truly significant for all of us was the joining together of the lawyers and judges of the United Kingdom and the lawyers and judges of the United States. By bringing together the four English Inns, the Commercial Bar of England and Wales with the American Inns of Court upon this historic occasion; we are as the governor said reaffirming our common understanding or our professional calling. We celebrate our coming history, pay tribute to our common law roots; and all of us, all of us, rededicate ourselves to a professional culture that will model for the world the working meaning of the rule of law. On behalf of the almost 370 American Inns of Court, I welcome our colleagues from the United Kingdom who have gathered here with us this week. My friends from the Inns give them a hand. (Applause)

We have been especially privileged to have several distinguished jurists from the United Kingdom with us. I would like to ask Lady Justice Mary Arden and Lord Justice Bernard Rix of the Court of Appeals of England and Wales, and Lord Manse, the Law Lord of the Appellate Committee of the House of Lords, please stand and be re organized. (Applause)

Whenever issues related to the rule of law are mentioned one jurist stands out; stands out as the leading advocate around the globe. Justice Sandra Day-O'Connor recently retired from active

service on the United States Supreme Court, has not retired at all from her tireless efforts to bring the message of the rule of law to all of the world. As a justice, she was an inspiration, a much needed voice, and an extraordinary jurist. As an ambassador for the rule of law she cannot be matched. And as a friend of the American Inns of Court she cannot be matched. Now thank you, Justice O'Connor, for all of those efforts. We will hear from her tomorrow. Justice O'Connor, join me in thanking her. (Applause)

Tonight, we are gathered together and have the extraordinary privilege of joining with two people who both symbolize and model the rule of law in our two nations for the world. Now these two share many of the same characteristics. They are both approachable but deserving of our utmost respect. They are both people who care very deeply about the law and its impact on the people, the institutions, the nation and the world that that law affects. They both give tirelessly of their time to their professions, their communities and their nation; and as we have learned this week, they're both just great guys. The Lord Chief Justice of England and Wales, the Right Honorable Lord Phillips of Worth Matravers, was educated at Kings College, Cambridge; served in the Royal Navy, was called to the Bar in 1962, Naval QC and rose through the ranks of the British Judiciary, becoming Master of the Rolls in the year 2000. Here this week has added so enormously to our understanding of the similarities and the differences of our systems that have made us understand that we have drawn from the same roots and have many of the same concerns. Lord Chief Justice and Lady Phillips would you please stand be recognized? (Applause) We have a small memento for Lord and Lady Phillips as well.

I began my remarks tonight by saying that events of historical significance are a confluence of time, place, and compelling circumstances. Here in the United States we had such a confluence in the year 2005. Exactly the right person stood at that confluence. The confirmation of John G. Roberts, Jr., as Chief Justice of the United States of America, was one of those moments in history when a person of impeccable qualifications, exceptional intellect, refreshing good humor, a plain

down-to-earth good sense and a clear commitment to highest human values, assumed the leadership of the American Judiciary. His biography is one of uninterrupted achievement. His AB and JD are from Harvard. He was a law clerk to the late Judge Henry Friendly and our late and most respected Chief Justice William Rehnquist. Served in the Justice Department, was a distinguished lawyer in private practice, where he earned a reputation as one of the finest appellate advocates in this country. I am still wondering, Mr. Chief Justice, whether you have yet heard as many cases as you argued in your court.

Those are all important qualifications, but the reason that he was exactly right for our time, in this place, are much more intangible. At a time when the three branches of government must, they must engage in meaningful dialogue, the Chief Justice very effectively and energetically brings the Judiciary into that dialogue. At a time when public servants must earn their respect and trust of the people, John Roberts is obviously a man of faith and a man of family. Indeed, we are most honored tonight that Jane Roberts, a lawyer herself, is with us and their two children, Josie and Jack, will be with us tomorrow. Jane, would you stand and be recognized? (Applause)

At a time when the public so badly needs educating about the law, the judiciary, what we do as lawyers and judges, this Chief Justice spends countless hours with school children, people of all ages, people of all stations of life, educating with them, talking with them, modeling what it is to be a symbol of the rule of law. And at a time when the Federal Judiciary in this country needs strong leadership, his considerable administrative skills are already very much at work. At a time, when the ideals of all of our Inns of Court must be given meaning by the conduct of all of us and our leaders, we are so very proud that this Chief Justice has been an Inn member. He is my Inn colleague, one of us, in the right place, at the right time, under compelling circumstances. So, please join me in welcoming this exceptional Inns of Court member, the Chief Justice of the United States of America, John G. Roberts. (Applause)

CHIEF JUSTICE ROBERTS

Thank you. Thank you very much, Judge Tacha. I am confident, after that overly confident introduction that I should quit while I am ahead (Laughter) The first two speakers spoke of being nervous and I know how I feel. As was the case in my practice days, it is still the case that I get nervous speaking in front of Justice O'Connor, but I will try to get over that. I am delighted to be here tonight to join with you in celebrating both the 400th Anniversary of the Founding of Jamestown and our shared commitment to the rule of law.

I am particularly pleased that this event has brought together two very important associations of lawyers, the Commercial Bar of England and Wales and the American Inns of Court. The members of each organization provide valuable service to the Bench and to the Bar, and in keeping with the bilateral spirit of the occasion, I am happy to report, as Judge Tacha indicated, that I am and have been for several years a member of an American Inns of Court named after a great English Jurist, Edward Hook Appellate Inn of Court in Washington.

Now it is quite natural that Edward Hook's name should come up in the joint celebration of the founding of Jamestown and the rule of law. Jamestown was, of course, named after King James. The year after Jamestown was founded, King James asserted the right to take over and decide any legal case pending in the realm, because the judges were simply his ministers. And as he put it, '*The law is founded upon reason; the King and others have reason, as well as judges.*' It was Lord Hook who barred the King from sitting in the Kings Court, proclaiming famously that the King should be under the law. That confrontation helped establish judicial independence from the Executive. It is so important that it is one of the great historical scenes depicted on the great bronze doors at our Supreme Court in Washington.

Now, as everyone knows, it was 400 years ago that the English settlers first came to this area, and I think it is fair to say that the place hasn't been the same since (Laughter) To our British visitors this evening, welcome back (Laughter and Applause). Sixty-four years ago, a person of both English

and American lineage described the enduring ties between the British and Americans in terms that cannot be better. He said and I quote,

‘The common conceptions of what is right and decent, marked regard for fair play, especially for the weak and poor, a stern sentiment of impartial justice, and above all a love of personal freedom. Those are the common conceptions on both sides of the ocean among the English speaking peoples.’

Now, the bonds that Winston Churchill described trace the founding of Jamestown.

Jamestown’s history reminds us that while the United States is an immigrant nation that has drawn its people and its character from around the globe, it has deep English roots. The Jamestown settlers brought with them an English language, institutions, and an English tradition of liberty that while a far cry from what we enjoy today, had already outpaced the rest world at that time.

As you have heard, the English Inns of Court played a critical role in the founding of the Jamestown colony. For centuries those English Inns of Court had trained British lawyers and promoted the development of English law. In the 17th century the members of the Inns were also entrepreneurs. They conceived of and invested in the ambitious enterprise of founding a colony in the New World. Sir Edwin Sandys, a member of the Middle Temple Inn, drafted the Virginia Charter for the Virginia Company that will lead to the founding of Jamestown and that historical document was signed in the hall of the Middle Temple.

The founding of Jamestown, of course, marked the first permanent English foothold in Virginia. Jamestown became and remained the seat of government for the Virginia Colony until 1698 when the colonists moved their capital from the swampy tidelands to the higher ground of Williamsburg. In 1780, following the American Revolution, Virginians moved their capital still further upland. They selected Richmond, where we meet this evening, in the Piedmont area of Virginia, to better protect their capital from the anticipated future British attack. Now, Virginias today, of course, welcome the invasion of British visitors to all three of these historic cities. (Laughter)

But apart from their historic charms, the cities illustrate an extraordinary political transition as Virginia successively moved its capital to higher elevations. Although I could point to a number of features of that transition, one of the most striking is the ascendancy of the concept of governmental powers; a concept that was to reach its highest development in our Constitution. The concept was completely foreign to the establishment of Jamestown. The Virginia Company provided that the colony would be ruled by a seven member council in Virginia. The Company selected the council and the council elected one of their members to serve as governor. The governor and council exercised all the colony's governmental powers; enacting rules, seeing to their enforcement and trying crimes.

By 1611, the government had adopted a famous criminal code containing, quote '*laws divine, political and marshal.*' But no matter how divine, the criminal system was harsh and autocratic, and it remained so even after that strict code was gradually relaxed. In 1624, for example, Royal Commissioners arrived in Virginia to consider converting the colony to a Crown colony. Already infused with the developing American spirit, the Virginians were reluctant to cooperate with the representatives of a far off central authority. The Clerk of the Council, however, Edward Sharpless, decided to turn over documents to the commissioners. When the commissioners left, he was tried by the Council for betrayal and was sentenced to the pillory where his ears were nailed to it and then cut off. (Laughter)

That same year, a colonist named Richard Barnes was tried – Governor Kaine, you will be interested in this (Laughter) – for quote, '*base and detracting speeches concerning the governor.*' The council ordered that the offender's arms be broken, his tongue boarded through with an awl, and that he be beaten by a guard of 40 men and banished from the colony. Both the First and the Eighth Amendments were still far in the future. (Laughter)

But as the Virginia Colony became more stable, the colonists insisted on a more representative system of government. In 1618, under the direction of Middle Templar Edwin Sandys, the Virginia Company authorized a representative body, the House of Burgesses, to enact legislation for the

Colony. The Company also provided that English Common Law would apply. And to ensure that Company rule did not lead to chaos the Company also began to transport quote, ‘marriageable women,’ end quote, to Virginia. It is reported that for the price of 120 pounds of tobacco the colonists could transport a bride across the ocean. (Laughter)

Now, the colonists valued their House of Burgesses, which in turn created a colonial court system for the trial of crimes and other disputes. The Crown retained that legislative body and the colonial system when it revoked the Virginia Company’s charter, and established Virginia as a royal colony. During this period lawyers began to make their appearance, including some who were known for their *rascality* as attorneys in England. (Laughter) So much so that in 1645 the House of Burgess enacted a law to expel from the Bar those mercenary lawyers who brought many troublesome suits (Laughter) Jamestown ultimately proved a poor home for the House of Burgesses. The first session in the House was cancelled because of an outbreak of Malaria, and the meeting house was burned down twice – once on purpose by the back country rebel Nathaniel Bacon and his followers and later by accident.

And when the Crown granted a royal charter to the College of William and Mary in Williamsburg, near the end of the 17th century, it was natural for the seat of Virginia’s government to be moved to Williamsburg to be united with the Colony’s center of academic learning. The House of Burgesses in Williamsburg became the center of political debate during the 18th century, much to the consternation of the crown. Its members included George Washington, Patrick Henry, Thomas Jefferson, whose birthday we celebrate today. In their call for independence these patriots complained, of course about taxation without representation.

But as the Declaration of Independence clearly stated they also objected to the Crown’s interference with their legislative official bodies. The colonists’ objections on this score initially arose out of a practical sense of injustice, arising from the King’s interference with specific laws or cases. But colonial lawyers, a significant number of whom were trained in the English Inns of Court,

increasing drew upon emerging legal and political theory to state the issue in more abstract and general terms of the separation of powers. Colonial lawyers were studying the writings of the famous Middle Templar scholar Sir William Blackstone whose influential commentaries on the laws of England provided American lawyers with a systematic view of the law. To this day many American lawyers are surprised when they learn the only statute outside my old court house, the Court of Appeals for the District of Columbia Circuit, is a ten foot statute of the English lawyer Blackstone, his place of honor is well deserved.

The colonists also had access to English translations of Montague's *Spirit of Laws*, which laid out the theory of separation of executive, legislative and judicial powers. Perhaps most significantly by 1780 George Whip, a scholarly lawyer turned professor at William and Mary, was teaching those principles to America's future statesmen. Now, the legal theory was on the rise in Williamsburg, the newly independent states were still faced with the practical problem of governing themselves.

When Virginians moved their capital from Williamsburg to Richmond, to protect against future British attack, they also moved their legislature – now known as the Virginia Assembly – from a center of learning to what was at the time a small disorderly town known for its taverns, drinking and gambling. The immediate consequences were predictable. (Laughter) A German visitor to Richmond observed, 'It is said the Virginia Assembly sits; but this is not a true expression, for these members show themselves at every possible position rather than that of sitting still, with dignity and attention.'

But the Virginia Assembly also attracted persons of extraordinary talent. In this respect, one of those individuals, the great and future Chief Justice John Marshall, stands out. A favored son of the city where we meet in tonight, he deserves special note, even on Jefferson's birthday. And no Chief Justice can travel to Richmond without discussing John Marshall. Marshall himself had migrated from Tidewater to Piedmont. After heroic service in the Revolutionary War, he had taken up study under George Whip at the College of William and Mary, where he came under the influence of Blackstone and Montague, but also the influence of his future wife, Polly Ambler, whose family had moved to

Richmond. Following his studies, Marshall was elected to the Virginia House of Delegates. He married Polly, moved to Richmond, took up the practice of law, building his reputation and success as a lawyer through skill and hard work.

By a curious twist of fate, his future adversary, Thomas Jefferson, indirectly bolstered Marshall's fledgling law practice. When Jefferson entered politics full-time, he turned his clients over to William Randolph. And when Randolph became governor of Virginia in 1776, Randolph turned Jefferson's former clients over to Marshall. Little did Jefferson know that his political aspirations would advance John Marshall's legal career. Marshall did not need to rely on inherited clients. He had a good sense of what lawyers today call *client development*. (Laughter)

There is a famous story about how a visitor to Richmond who needed a lawyer to try a case was referred to the Young Marshall. The visitor was put off, though, by Marshall's unassuming appearance and negligent dress, so he hired a different lawyer. The visitor went to court to wait for his case to be called. There the visitor sat and watched as Marshall, in the first case of the day, soundly trounced the lawyer the visitor had hired. The visitor quickly sought out Marshall to take his case. He explained that he had paid \$95 to the other lawyer and he only had \$5 left. Marshall, nonetheless, agreed to take the case for \$5, no doubt realizing that the story would be good for his reputation. (Laughter)

Marshall was a distinguished resident of Richmond, but not just for his legal ability. He also helped found Richmond's first volunteer fire department and served part-time on the Richmond City's Hustling Board, which was his only judicial experience before being named chief Justice.

The point I would like to focus on tonight, however, is that John Marshall, as a young lawyer in Richmond, was already keenly aware of the importance of separation of powers. In 1783, four years before our Constitutional Convention, 20 years before *Marbury vs. Madison*, he participated in a controversy that showed his understanding of and commitment to that principle. The issue arose in the context of a 1783 Virginia law that simply put allowed the governor, on the advice of his council, to

remove a judge for misconduct. Marshall was a member of the Governor's Council and he argued strenuously that the law violated the Virginia Constitution of that era, because it vested the Governor's Council with judicial power. And in the face of Marshall's strenuous and steady opposition the Council refused to apply the statute.

When Marshall later resigned from the Council, however, the Council reversed course and removed a magistrate. But that was not the end of the matter. Two years later, Marshall returned to the Virginia Legislature, and as an important first order of business, led a special movement to repeal the 1783 statute. In short, it was clear long before Marbury, and even before the adoption of the United States Constitution, that John Marshall saw the fundamental importance of the separation of powers and an independent judiciary. His consistent course of action demonstrates that he held the view that separation of powers was critical to the preservation of liberty, whether he was a member of the Executive, the Legislature or the Judicial Branch.

Now, the participants in the Constitutional Convention who convened in 1787 went on, of course, to establish a government of expressly divided powers. And Chief Justice Marshall, in 1803, had an opportunity to state his views in the historic Marbury opinion. I think it is fair to say that America's contribution to the rule of law has been its creation of a workable system of divided government that relies on an independent judiciary to interpret the law. I also think it significant that Justice Sir Edwin Sandys and the other members of the English Inns of Court, had the wisdom to transplant the principles of English liberty to Jamestown, and those English ideas took root in America.

The American principle of separation of powers has travelled back across the ocean and taken root in America's Mother country. When Jamestown was founded, or Hook was bravely establishing the independence of the Judiciary from Executive control, in Great Britain's Constitutional Reform Act of 2005, Parliament promoted the independence of the Judiciary from the Legislative Branch. That act creates a new Supreme Court of the United Kingdom, separate from the House of Lords. I think John Marshall would be pleased to see that the concept of the separation of powers and, and in particular the

separation of the Judicial function from the Legislative, has made the return trip back home to England.

Now, I would like to just end on a somewhat personal note. People have asked me over the past year and a half what has struck me the most in my new position. And I have to answer that it has been the number of foreign visitors from around the world who come to the Supreme Court, anxious and often working at great personal peril to establish the rule of law and an independent Judiciary in their countries. They come to the court; they view it as a temple of the principle they are trying to enact in their lands. And it is extraordinary difficult. You can imagine in a country that hasn't enjoyed a tradition of democracy, doesn't have a tradition of an independent bar, establishing judicial review and an independent judiciary is a daunting task.

As a young nation, we were blessed that our forebears came from a tradition where an independent judiciary, an independent bar, were not all foreign but were a part of their notions of English liberty. That is why I think we were able to succeed in establishing an independent judiciary, and why a great statesman like John Marshall could articulate what independent review of the Judicial branch that was central to that Constitutional tradition. These other countries are not similarly blessed. So, when we celebrate the 400th anniversary of the founding of Jamestown we need to recognize the debt that we owe to this day to the Mother Country across the ocean. Thank you all very much for your patience. Thank you, again. (Applause)

Dean Smolla presented Chief Justice Roberts with an award named after Judge William Green, one of the first faculty members at the University of Richmond, captures the essences of his speech to the first graduating class in 1870:

'Success in the law lies not in the pursuit of money, office, or victory over one's rivals, but in the pursuit of excellence: the ceaseless struggle to realize to reach one's own potential.'

Quoting Chief Justice Roberts' Opinion regarding the Vienna Convention:

'Under our Constitution, the judicial power of the United States is vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. That judicial power extends to treaties and as Chief Justice Marshall famously explained, 'that judicial power includes the duty to say what the law is,' Marbury vs. Madison.' If treaties are to be given effect, as federal law under our legal system, determining their meaning as a matter of federal law is emphatically the province and duty of the judicial department, headed by the one Supreme Court established by the Constitution.'

Chief Justice Roberts accepted award.

**Historic Jamestown, Justice Lemons, Lord Phillips, John Robert
and Justice Sandra Day O'Connor**

Discs opens to marching band as participants are seated.

MODERATOR JUSTICE LEMONDS: Welcome. For those of you who are outside the tent I urge you to come a bit closer so that you can participate in this ceremony as well. I am Don Lemons. I am a Justice of the Supreme Court of Virginia; a member of the Board of Trustees of the American Inns of Court, a member of the Jamestown 2007 Steering Committee, and we are all here together, with the wonderful benevolence of no rain. (Laughter) I know you're happy about that. It was two and a half years of planning that allowed there not to be any rain here today. (Laughter) Welcome to this historic occasion.

Several years ago when I was in London working on some of the planning of this event and others associated with the 400th Anniversary of the founding of Jamestown, I was speaking with the leadership of the four English Inns of Court about what they could do to make this a memorable event, not only for Americans but for those of Great Britain. Out of these discussions came the idea that there would be a memorial plaque placed on this site at historic Jamestown, to memorialize not only the actual involvement of the British Inns of Court in the settlement, but also the continued commitment of our two nations to the rule of law in the resolution of the disputes of mankind.

Now, when I was in high school, I didn't know what a barrister was, and I dare say that not too many people in the United States do know what a barrister might be. But the barrister had an extraordinary involvement in the actual settlement of Jamestown. I like to say to those who will listen that it was the first contribution that lawyers made to America and not the only one. (Laughter) Not only did the barristers draft the corporate documents necessary for the actual exploration and settlement of Jamestown, they also were some of the first settlers. And beyond

that, they drafted the documents that were necessary to provide governance. In 1619, in the church that you will see in the distance and will most likely visit, the first General Assembly of Virginia took place.

Today this plaque commemorates the involvement of the barristers in the settlement and the continued commitment of both of our countries to the rule of law. This ceremony could not have taken place without the help of several groups and people that I need to mention to you. First of all, are the American Inns of Court and the four British Inns of Court. Somewhere in this crowd I know we have the four treasurers – there they are, the four treasurers (Applause). (Now, that right there is a bit of serendipity. The Godspeed is going by in the river, (Laughter) as we speak.)

I would like to recognize the treasurers. Now, in the English system the treasurers are the senior officers of the Inns of Court: Sir Robin Jacobs from Grays Inn; Roy Amlot from Lincolns Inn; Lord Justice Bernard Rix is a former treasurer and is representing the Inner Temple; Mr. Robert Seabrook from the Middle Temple, (Applause) a great round of Applause for our treasurers. (Applause)

From the American Inns of Court, we have the President of the American Inns of Court, Chief Judge Daneal Tacha. Judge Daneal Tacha, will you please stand? (Applause) Thank you.

This event would not have taken place without the cooperation of the National Parks Service, and Mr. Sandy Reeves; where is – there he is over there. Sandy Reeves is the director on this site, and we thank Sandy.

The University of Richmond has been an extraordinarily generous participant in this project. In the Rule of Law Conference, in this particular event here today and has been very supportive of all events associated with the founding of this celebration of the founding of Jamestown. Dean Rod Smolla, where is he? Dean Rod Smolla (Applause) for the University of Richmond.

Now, in many respects I saved an organization whose contribution just can't be measured for last. It is the Association for the Preservation of Virginia Antiquities, the APVA. This organization

owns this site, the National Parks Service owns another site, and they work cooperatively to interpret this site for millions of visitors. Without the assistance of the people, the Board of the APVA, and particularly the President, Barry Kirkham – Barry, are you located nearby? Elizabeth Kostelny the Executive Director; and Ann Berry – where is Ann Berry, the Site Coordinator is here. We are grateful to the APVA for all that they done to preserve this historic site as a monument to democracy. Now, the plaque is permanently placed at the entrance to the **Arcorarium**, which you will see off to the back. As such, the APVA has given this plaque a prominent, primary spot for visitors from around the world that will come here. There is a story board above it that explains not only the role of the barrister, but the continued commitment to the rule of law. All of the visitors to the **Arcorarium** will have to pass in front of the plaque and no longer will school children like me not know what a barrister is. (Laughter)

The members of the Federal Jamestown Commission are here, many of them are in the crowd. We thank all of those members, including my friend Frank Atkinson, who is there in the crowd, the chairman. For many years now they have been planning to put on these various conferences and these historic events that you take part in here today. Frank, and members of the Commission, thank you very much (Applause).

With us today to present this memorial plaque is the Lord Chief Justice, Lord Phillips, the Lord Chief Justice of England and Wales, he is here to present the plaque and with us today to receive this memorial plaque is the Chief Justice of the United States, John Roberts. Lord Chief Justice of England and Wales, Lord Phillips is a member of Middle Temple. And I am very proud to tell you that the Chief Justice of the United States is a member of the American Inns of court. Lord Chief Justice Phillips (Applause).

LORD CHIEF JUSTICE PHILLIPS: Ladies and gentlemen, this occasion marks 400 years of strong links between the four English Inns of Court and this continent. Four hundred years ago, the Inns of Court were more appropriately named than they are today. Each Inn had its great hall

where judges, barristers and law students dined together, and the lodgings where they lived were grouped around the halls. But the Inns attracted more than lawyers. Gentlemen and those who aspired to be gentlemen joined the Inns for social life. This was particularly true of my Inn, the Middle Temple, which numbered both Sir Francis Drake and Sir Walter Raleigh among its members. Sir Walter had, of course, been responsible for the unsuccessful attempt to found a colony at Roanoke. It is an irony that my predecessor, as Chief Justice, Sir John Poppin, a member of the Middle Temple, who was to sentence Sir Walter Raleigh to death after his trumped up treason trial, should have been the moving spirit behind persuading King James I to grant the first Virginia Charter.

Pursuant to that Charter, there arrived at the mouth of Chesapeake Bay 400 years ago, three ships so tiny that I would have been reluctant to trust myself in one of them, to the voyage down the Thames to Westminster to Greenwich (Laughter), let alone across the Atlantic. And from these three ships there subsequently disembarked, on this very spot, the 107 men – there were no women – who founded the first English speaking colony on the American continent. The women, I hesitate to say, followed soon after but this sort of colony wouldn't have lasted very long anyway. (Laughter)

First, settlers included members of the Inns of Court, as did others who followed them to farm the other early colonies. Many of these sent their own sons back to England to join the Inns. The members of the Inns played a full part in the drafting of the constitutions of those colonies and in the events that transformed those colonies into the United States of America. Five of those who signed the Declaration of Independence were members of my Inn, as were seven of those who signed the Constitution.

The links between the Inns of Court and this Country have persisted to this day; links with your own Inns of Court, with your gifted scholars who come to spend time with us every year; links a personal friendship between the judges and the barristers of the English Inns and their counterparts

over here. We are bound together not just by friendship but by a mutual dedication to the rule of law. It reflects that friendship and that dedication that your Chief Justice, the Honorable John Roberts, who later this year is doing us the honor of coming to England to take his place as an honorary bencher of the Middle Temple, should be here this afternoon to receive on the part of the American people the plaque. The plaque is in situ, but I have the greatest pleasure in symbolically presenting it at this moment to your Chief Justice.

ACCEPTING PLAQUE: Chief Justice John Roberts: Thank you very much Lord Phillips, and thank you, Justice Lemons. This handsome plaque appropriately commemorates a matter of great and enduring significance for my country. The English Inns of Court played an essential role in the founding of Jamestown as you have heard. The Charter of the Virginia Company was drafted by members of the Inns of Court, signed in the halls of the Middle Temple. Members of the Inn conceived of and invested in and joined the ambitious enterprise of founding a colony in the New World.

English Inns of Court also played a crucial role in the introduction of England's tradition of liberty to the New World. The original Virginia Charter expressly preserved for the colonists the familiar words, quote, 'liberties, franchises and immunities of subjects residing in England.' And the English Inns of Court also helped plant the seeds of democracy in the New World. When Middle Temple member Sir Edward Standish obtained a revised the Charter in 1618, he insured that the Virginia colony had its own legislature. That legislature evolved from the Colonial House of Burgesses – which itself became a champion for the cause American liberty – and into the current Virginia Assembly.

But perhaps most importantly the English Inns of Court directly and indirectly trained American lawyers. By 1815 more than 200 American born lawyers had traveled to England to receive instruction at the English Inns of Court; countless more were influenced by the writings of

Middle Templar Sir William Blackstone. These lawyers would later assist in drafting the Declaration of Independence, the United States Constitution and various state constitutions.

But I think it would be a mistake to focus our gratitude only on the historic contributions of the Inns of Court. The English Inns of Court continue to inspire the American legal community. They have served as models for the emergence of a system of American Inns of Court, and they continue to be very active partners in the tradition of Anglo American legal cooperation.

Thank you very much for this plaque, as both a commemoration of the past contributions of the English Inns of Court, and as a gracious offer of continued cooperation among future generations of Anglo American lawyers. On behalf of Jamestown and on behalf of my country, the United States of America, I am happy to accept the plaque. Thank you. (Applause)

MODERATOR JUSTICE LEMONDS: Justice Sandra Day-O'Connor is a significant figure in American history. As the first woman Justice of the United States, she has served the nation 25 years. Justice O'Connor has not retired. (Laughter) She may have retired from the Court but she is as busy and as enthusiastic as ever in her service to the nation. We are grateful to her for her willingness to adding leadership to the Commemoration of the 400th Anniversary to the Settlement of Jamestown, because Justice O'Connor is the honorary chair of America's 400th Anniversary. Please welcome Justice Sandra Day-O'Connor. (Applause)

JUSTICE SANDRA DAY-O'CONNOR: You've been standing long enough and I am going to be brief. I had no idea when I accepted the invitation to be honorary chair of the events commemorating the 400th birthday of Jamestown, that there would be so many superb events that would bring me back to this area to celebrate, and this is the first of many. If this is the first it has set a wonder example. It is very well attended and it reminds us all of the bonds between us and our forefathers coming from Great Britain and how much we share. How they blessed us with the notions embodied in the Magna Carta, 400 years before Jamestown, and than to inherit the British

legal traditions of an independent judiciary and the rule of law. That is the great blessing we got from the English settlement.

Now we had a little disagreement in the 1700s (Laughter), but I think this celebration proves, if we needed any proof, that that is long over and forgotten. (Laughter) We cannot thank enough the people who have come here for this celebration, from Great Britain, from the Inns of Court, that played such a key role in drafting the Virginia Charter and for giving us that heritage which we most treasure. Thank all of you for coming. Come back to the other celebrations, will you? (Applause) Thank you.

MODERATOR JUSTICE LEMONDS: As we conclude this ceremony, I'm going to ask you all to cooperate with me just a little bit. We have a huge crowd and we have lots of things available for you to see. I'd like, if you will, to divide somewhat arbitrarily this group, right down the middle. All the people on the right-hand side go with Dr. William Kelso. Where is Dr. Kelso? Is he here? (Laughter) Oh, well, now, you need to go over here to my right. Dr. Kelso is one of the true unsung heroes, although I might add that in recent days he has been pretty well sung for his contributions. Dr. Kelso is the chief archeologist on this site. And for years people were told that the Jamestown Fort is in the river. I remember coming here as a child and being told that. But he didn't believe it. He read every scrap of information about this place and with a tenacious and persistent effort on his part; he convinced people that, in fact, the fort is still here. Indeed they started digging and because of Bill Kelso, we have actually found the Jamestown Fort, within the last ten years. He's going to take this side of the group to the Jamestown Archeological Dig.

And this side of the group is going to go to the Arcorarium, which is behind me. The Arcorarium is located on the site of the remains of over 800 English settlers, and has in it, in the museum itself, many of the things that have been found in the archeological dig that has been led by Dr. Kelso, the gentleman over there.

Now, I am going to ask this group going to the Arcorarium, to wait here for about ten minutes. Enjoy the reception, do whatever you like, but we're going to take this group up to the actual plaque and we would like to be undisturbed for about ten minutes while there are a few photographs taken. Then this group can up by the actual plaque, which I assure you reads exactly as this one _____ (Laughter)

And enjoy your stay. So ladies and gentlemen thank you for coming to this historic occasion and this plaque presentation ceremony is now concluded. Thank you. (Standing Applause)

Judge Breyer Interview, Cutaways, Lord Phillips Interview**And Speech & Exteriors**

First minutes of disc opened with silent shots of sign 'The Foundations and Future of Democracy,' and ladies and gentlemen meandering around the building, and preparation of Justice Breyer.

Judge Breyer Interview

QUESTION: What is the connection between Jamestown and democracy?

JUSTICE BREYER: I think that Jamestown was the first place in the Continental United States where they had a democratic assembly, where they had basically a democratic form of government. That's an important connection.

QUESTION: How has the U.S. Supreme Court carried out the legacy of democracy that began with the founding Jamestown 400 years ago?

JUSTICE BREYER: I would say there is one very definite step and then a lot of further steps. The definite step is the writing of the Constitution. When the founders wrote the Constitution they wrote a document that I think I and my colleagues would describe as fundamentally creating democratic political institutions; that is what the Constitution is all about, that's what is at its heart. It's a certain kind of Constitutional democracy. It's a democracy that respects basic human rights, it assures a degree of equality, it divides power between states and federal governments among three branches, so no one becomes too powerful and it insists upon a rule of law. So that's a special kind of democracy that at its heart is the democracy. Now, the Supreme Court, in a democratic country, knows that it itself is not elected. So we are not a democratic institution.

Why are we there at all? Because what we are doing is controlling the boundaries of those democratic institutions; to see that the legislatures and others who make laws don't go beyond those boundaries. People sometimes forget that. They think that what we are saying is what

everyone should do; we don't say that. What we are saying is – what are the boundaries within which people decide for themselves what to do. Those boundaries are very, very broad. People sometimes forget that. That what the founders had in mind was not a court that would tell people what to do. It was a court where it would preserve institutions for people to make up their own minds.

Now, I'm not saying life is easy at the boundary – the frontier is always difficult. But however difficult, those cases are very difficult, I think it is very important for everybody to remember – in the high schools, the colleges and everywhere else – that the founders, and perhaps traced all the way back to Jamestown, had the thought in their mind that the average citizen will participate in that democratic government. I think that happened in Jamestown. I think people did participate. And if they don't continue to participate, well, I don't know what will happen but I know that the Constitution won't work at all. So, I think that is the tradition that you can trace back to Jamestown.

QUESTION: One last question. What lessons can emerging democracies learn from Jamestown?

JUSTICE BREYER: *Ha*, I laughed a little bit because I read a little bit of the history and I think they had a rough time. So, I would say the first lesson they ought to learn is to get along with your neighbors. The second lesson they ought to learn, perhaps, is that they want a democracy, or a government, or a country that is *inclusive*. I mean there is no real good reason that I know of – I'm not an expert at all – but why couldn't the settlers get along a little better with the Indians? Why did they have to try to dominate the Indians; why couldn't they try to incorporate them? I know that makes no sense historically. I think still, it might be helpful of every country, including this one, to take into account that we are a country of 300 million people. We have every possible opinion, every possible race, every possible point of view, every possible point religion, every possible national origin; they are all here and they all live together in a democracy. I think if you were to learn a lesson that Jamestown didn't do that I think emerging countries and countries that

have emerged, can keep their eye on I would say it was that lesson – get along with your neighbors and be inclusive and not exclusive, in terms of who participates in your own country.

This session of the Breyer interview is a copy of another session. Please see Disc 1: Panel on Global Issues and the Rule of Law.

Interview of Justice Phillips

QUESTION: What is the connection between Jamestown and democracy?

LORD JUSTICE PHILLIPS: Jamestown was the first place that the first settlers who came and stayed in this country landed, and they landed here, I think, on April 26 on Chesapeake Bay, they landed exactly 400 years ago. Now, they came here not in order to bring democracy to those who lived in the Americas; they came here for profit, they thought they were going to find gold and go back very rich. But the initiative for this expedition came from, quite a large extent, members of my Inn of Court, the Middle Temple in London, and that Inn of Court, its primary role was as the place where the practicing lawyers lived and dined in Hall, and taught the young men law. It was one of my predecessors Sir John Poppin, who was the Chief Justice of the Queen's Bench, we are talking about Queen Elizabeth I, who really put together the Virginia Company and the Virginia Company then got the Virginia Charter; this was 399 years ago, and it was with that Charter that the first settlers came over here. And they included some lawyers, although most of them were, I suppose, one might say businessmen; people hoping to make money, there were lawyers with them, and the lawyers remained.

One of the first governors of Virginia was called Percy – rather the Duke of Northumberland. He was a member of the Middle Temple. And there was a gentleman called Sands, who was a member of the Middle Temple, didn't come here, but he drafted the first charter, and more significantly he drafted the great charter, I think, of 1618. It was that which established for the first time a community with a rule of law, because that established a parliament and an entitlement to jury trial, if you were charged with a criminal offense. These were the very beginnings of

democracy. After that, as the colonies spread, the influence of lawyers from the Middle Temple and other Inns of Court remained considerable.

The wealthier families used to send their sons back to England, right across the Atlantic, to join the Middle Temple, to study law. By the time we get to the Declaration of Independence you have about 150 members from the Middle Temple, quite apart from the other Inns of Court, taking part in these events. They were not all fighting for independence – some were loyalists, but there were five signatories to the Declaration of Independence from Middle Temple, and seven signatories to the Constitution. But you can say that Jamestown was the beginning of all of this.

QUESTION: What lessons can emerging democracies learn from Jamestown?

LORD JUSTICE PHILLIPS: They would not learn very good lessons if they saw what happened initially at Jamestown. The lessons, I think, to be learned are from what grew out of those early seeds of democracy. So, that I think, if anyone looked at your Constitution – it's a pretty good model for a democratic constitution. We, in the United Kingdom don't have a written constitution and sometimes are quite jealous of the United States'.

QUESTION: British rule was a major contributor to Jamestown in the establishment of democracy.

What do you see as the lasting legacy of British rule on democracy?

LORD JUSTICE PHILLIPS: I would say the lasting legacy is the common rule we're talking about – sorry, common law. We are now talking about democracy in this country, because, of course, there are different models. But you, as we do in the United Kingdom, have as the basis for your law the common law; and with the common law you have jury trial. We have kept juries for criminal cases. We haven't got them for most civil cases now. You still have your jury trials. These are, again, a legacy of the early English settlers.

QUESTION: Justice Lemons asked me to ask you one off the cuff question. About those wigs, are you still going to be wearing the wigs all the time, or do you think those wigs are going to be going away? (Laughter)

LORD JUSTICE PHILLIPS: Now, when is this going to be broadcast because this is highly confidential? (Laughter)

QUESTION: Okay, we won't tell anyone.

LORD JUSTICE PHILLIPS: I personally have never been in favor of wigs.

QUESTION: That's what he told me (Laughter)

LORD JUSTICE PHILLIPS: I hope that I shall be bringing about the abolition of wearing wigs for civil cases, as from October. We will go on wearing them for criminal cases, where there are much more cogent arguments for doing so, such as the fact that they actually disguise those who are taking part. And they give a bit more confidence to the younger advocates who may be having to deal with some quite tricky clients.

QUESTION: Thank you for sharing; we were just wondering.

LORD JUSTICE PHILLIPS: Pleasure.

Outside shots of a building.

HOST DEAN SMOLLA: If you were at this afternoon's panel, you heard Justice Breyer mentioned a trip he took with Justice O'Connor and my wife, Michelle. And I had the good fortune on Friday to hear Justice O'Connor speak to a group in Washington, to commemorate the 100th birthday of Justice Louis Powell, who is dear to the hearts of all of us here in Richmond. Many of you have connections with Justice Powell; Judge Wilkerson was his clerk, among other things. And there was a story told by Justice Powell's son, Lewis Powell, III, who practices here in the city, that somehow seemed apropos as we continue with the festivities. Like Lady Justice Arden, of course, Sandra Day-O'Connor was a pioneer in American law; and she was, among other things, the first woman to be a Justice of the Supreme Court of the United States, but also was, when she was appointed, among the youngest justices at a time in which the Court was quite elderly.

So, Lewis Powell told the story that it was the first occasion for the justices to go to dinner in Washington, outside of the Supreme Court building itself. The waiter came up to the table and first

approached Justice O'Connor and said, 'What would you like to eat this evening, Madam?' And she said, 'Well, I think I'll have the filet.' And he said, 'Well, what about the vegetables?' And she said, 'Ah, they can order for themselves.' (Laughter) Like a lot of English and American legal folklore, I'm sure that story isn't authentic, but who cares. (Laughter)

It is my honor to introduce to you the co-chair of the conference, Justice Donald Lemons, of the Supreme Court of Virginia, who was the person who first had the idea for this event, and who has been tireless in his energies to make this possible. All of us, on both sides of the Atlantic, all of us that are a part of the Commonwealth, all of us that are associated with the University of Richmond, owe him a great debt for his vision in conceiving of the conference, and his energies in helping to make it possible. It is my pleasure to introduce my friend and colleague Justice Donald Lemons of the Virginia Supreme Court.

JUSTICE DONALD LEMONS: It is terrific to see so many friends from both sides of the Atlantic out here. You know, this was a dream two and a half years ago and we have been working very, very hard to make it come true. I was asked by members of the media last week who saw the program and they said, 'Well, now, was it difficult to get all of these wonderful people together?' It was the first time someone had asked me that and the answer was, 'No, it wasn't.' All of these wonderful people wanted to be here and wanted to be a part of this conference and the ongoing dialogue and discussion that we are having about the rule of law, at a time when we have a retrospective of 400 years of this experiment in democracy in America. So, thank you all for being here. I don't want to suggest its over, we have a few more days left, including a grand celebration at Jamestown itself, and I hope to see all of you down there as well.

I do know this. I have a little bar set up in my room at the Jefferson Hotel. And my friends from the British judiciary are actually going to take back with them a new thing that I have introduced them to. It is what they found to be a novelty; it is actually a pomegranate martini. (Laughter) Now, I don't know that any of you have had that, but I assure you they don't have that

in London. (Laughter) I am counting on them taking it back so that when I come there – I'll be there the later part of the year – I want to see that on the menus for the various bars and restaurants.

(Laughter)

It is my pleasure to introduce to you this evening Mr. Allan Charlton. He is the Deputy Head of Mission for the British Embassy in Washington. He has had numerous, very challenging and exciting diplomatic posts around the world, on behalf of his country. He has been posted to Germany, to countries in the Balkans, to both Israel and Jordan; that ought to be enough to write a book, in and of itself, but I suspect you'll be far more discrete than that and not write about it. Of course, he is now posted in our nation's capital, along with Ambassador David Manning. Ambassador Manning was not able to be here with us today, but it is fitting that Allan Charlton is here with us today, because from the very beginning Allan Charlton has been a great, enthusiastic supporter of this conference that we are having here today; but more importantly the entire celebration and commemoration that we are having around the first English settlement, Jamestown, 400 years ago. So, here today, on behalf of the Ambassador from Great Britain, is Allan Charlton. Please welcome him to the podium. (Applause)

AMBASSADOR ALLAN CHARLTON: Well, thank you very much. It is a great honor to be invited to join you this evening and also to hear the 14th Annual Austin-Owen lecture to be given by Lord Phillips, the Lord Chief Justice of England and Wales. I would like to express gratitude to Lord Phillips and Lady Arden and Lord Manse and Lord Rix, for their visit here to the U.S., to Richmond for this conference; and it is inspiring to see so many distinguished American guests, from the University, community leaders, high court judges and Supreme Court Justice Steven Breyer in front of me here.

I know I have come to the cradle of civilization here in University of Richmond. As I came in this evening in the car, I saw the street sign saying, *UR*; U R Street. (Laughter) It only just

occurred to me afterwards that it stood for University of Richmond (Laughter), but anyhow I know I have come to the right place.

Let me just say three things quickly. First I want to express my admiration for the work of everyone in Virginia and at the federal level in preparing the events for the 400th anniversary of the founding of Jamestown, in which this Rule of Law Conference this week, hosted by the University of Richmond, is a part. I know how much so many people have been involved, particularly Don Lemons. There are so many people who have been doing all this. When I was first briefed on this event and other events of Jamestown, about three years ago, frankly, I was taken aback and completely dazzled by the idea of having so much going on at such a high level, over such a long period of time. I think it is a real testimony to the people who have been involved in all this, that it's all coming together so very, very well. I am delighted personally, as a British diplomat, that Her Majesty the Queen and His Royal Highness the Duke of Edinburgh, will be visiting Virginia next month to play their part in this commemoration.

Secondly, I just wanted to say that the commemoration is, of course, a reminder of the connections between America and the UK, and more widely, Europe, I would say. Since, I'm saying the late 16th century my country has been strongly internationalists. At that time it was a matter of national security and prosperity. Security because of the threat of invasion; prosperity because even then we knew we were living on small islands which were heavily used, and we needed interaction to create more wealth. Now, today, security and prosperity remain the drivers of our domestic reform policy, and we continue to depend on internationalism. Threats are evermore transnational. As we know, terrorism is supported by ideologies and people around the world, but opportunities are also transnational. An open trade and investment climate is essential, and no more is that clear than in the City of London, which has continued to grow as a great financial center and creator of wealth for the UK.

I think the UK and the US have to continue to work together to protect ourselves and protect terrorism [sic]. I recall in particular last August, when I was in charge of the Embassy, how well our cooperation went ahead in response to the suspected plots to destroy airlines mid-Atlantic, and that sort of thing is happening everyday behind the scenes, the cooperation between our two countries and more widely across Europe, I would say. We also have work to do to roll back the barriers to business, including, I think, opening up our markets to international investment.

The third thing I would say, and I say this with some hesitation in front of this august legal audience, is that I also think that the US and the UK need to work together to shape the development of international law in this globalized world. And as a diplomat I am very conscience of the importance of international law in my own daily labors. Obviously, we have to do that in line with our values and principles. We have to ensure that we conduct ourselves in accordance with these values and principles. I think we have done so in the past, but not always as swiftly in every case as we should have.

And we are recalling that in a way this year in Britain with the bicentennial of the abolition of slave trade, by an act of Parliament. As the lawyers will know much better than I, slavery was not an institution as such in Britain, and there was a landmark ruling by Lord Justice Mansfield in 1772, which made it pretty clear that it wasn't legal in England and that had some people in the British colonies rather worried, too. But profits in the slave trade were very high and delayed abolition in Britain. Here, of course, in America the abolition of slavery was also a great cause, finally resolved after the Civil War. I think actually going back to the Jamestown celebration; it is one of the great achievements of it. That it is woven together the stories not only of British and European settlers, not only also of the Native American Indians, but also of the African Americans who arrived later, free, indentured and some later enslaved.

Finally, words of thanks. Thanks for this wonderful dinner and occasion. Thanks for the conference. Thanks for the Commemoration of the 400th Anniversary of Jamestown. And thanks

for the continuing connections between America and the UK and Europe, which I think are essential for shaping the world of the future. Thank you. (Applause)

JUSTICE LEMONS: Thank you, Allan. About two years ago I had the distinct pleasure of attending a ceremony that I know I'll never forget, and I hope to see again, it's the opening of the Law Court in Westminster Abbey. There in that wonderful cathedral, in procession, were the judges and justices and barristers of Great Britain. They come in led by the Lord Chief Justice who is wearing an ermine robe and has a gold chain of office. And I thought for a moment, 'Why did we give that up'? (Laughter) Then I thought better of my senses and realize why we gave it up. But nonetheless I must tell you I was very impressed by the pageantry and all that it means, not only to Great Britain but to us, as we look to them as our professional ancestors. And I have to tell you by way of true confession, that when it came time to sing *God Save the Queen*, there was no one there who sang it with more enthusiasm than I did. (Laughter) I look forward to going back sometime and repeating that experience. It is a marvelous bit of pageantry.

Well, I was also very interested because the procession was led by the Lord Chief Justice, followed by the Master of the Rolls, and the rest of the British judiciary in attendance and the barristers. I knew that I was to meet the Lord Chief Justice in several days, and so I found it all fascinating. In this digital age, where virtually everyone on the planet is only a Google search away – it sounds so terrible for me to say this, but I googled the Lord Chief Justice. (Laughter) I am so sorry to have to tell you that, but I googled the Lord Chief Justice because I wanted to find out more about this person. So, I when went to the website – you can still do this yourself if you are technically competent enough to know how to google someone – and there on the website for the British Judiciary are pictures of various members of the judiciary. Some of them in robes, some of them in business suits, some of them more appointed and adorned than others, some wearing wigs, some not.

But there is the Lord Chief Justice of England and Wales in an open shirt, holding his grandson. (Laughter with oohs and ahs). I said I really have to meet this man. This is an extraordinary man. I just saw him walking down the aisle in Westminster Abbey clothed in ermine, with the authority of his office in gold chains, leading the entire British judiciary in a service that opens the Law Courts every year, and has done so for hundreds of years.

I must tell you that I've been impressed with everything I have learned about Lord Nicolas Phillips. After military service as a commissioned officer in the Royal Navy, the Lord Chief Justice was educated at Kings College, Cambridge, where he obtained a law degree and was later called to the Bar at Middle Temple. He later achieved the coveted designation of Queen's Counsel, and after a distinguished career as a barrister the Lord Chief Justice began his new career as a jurist. He advanced through the court system with extraordinary speed: became a Lord Justice of Appeal, a member of the Privy Council, was elevated to the House of Lords where he became a Lord of Appeal in Ordinary – what we call a Law Lord, for all of you Americans that wonder how this system works. Shortly thereafter he became Master of the Rolls and on October 1, 2005, he became Lord Chief Justice of England and Wales.

Nicolas Phillips is recognized by his colleagues at the Bench and the Bar as an enormously competent jurist. He is a man with uncommonly good judgment, impeccable character, patience that is fitting to an excellent judge and the courage to make very difficult decisions as he maintains the independence of the Judicial Branch of government in Great Britain. He has taken the responsibility as head of the judiciary at a time when the Constitutional Reform Act of 2005 has restructured the judicial function all together. In many ways, he is at the helm of the ship in uncharted waters. He is a man of vision and a man of compassion.

He has recently endured a bit of a firestorm of his own in the local press in London and around England, about his proposals which are very brave. They are visionary proposals. They are proposals that received a little bit of pushback; however, if you will. His proposals to treat non-

violent criminals differently than violent ones, to allow them to serve sentences in a more therapeutic and rehabilitative model, has not reaped all that much support in some quarters in his own country. As you might expect of this man, he wanted to see first hand what a community service work project was all about, and so the Lord Chief Justice of England and Wales had himself placed on a work project, with non-violent criminals convicted in the courts of the United Kingdom.

I am told that he developed a cover story, lest someone asked him what he did for a living. I am not sure that our Americans in this room will appreciate this as much as our friends from Great Britain. His cover story was not that he was the Lord Chief Justice, not that he was a judge and, of course, he would never sully the reputation of the barristers. Consequently, his cover story which thankfully he never had to use, was that he was a bit of a confused solicitor who had had been caught for drunk driving. (Laughter) I know that all my barrister friends here in the room are greatly appreciative that he was not about to sully the good name of any of the four Inns of Court in London.

On a nice day, you may see the Lord Chief Justice arriving at the Royal Courts of Justice on _____ and he will not be wearing a long wig, or even a short one, for that matter because he'll be on his bicycle and he'll be wearing a wig of sorts that is called a helmet. (Laughter) I have to tell you that it is such a contrast to the man that I saw leading the British judiciary down the isle of Westminster Abbey, in ermine and in gold. But it is that kind of person who is now the Lord Chief Justice of England and Wales. He loves everything in French, including his lovely wife, Christylle, who is French born. And I am most grateful to him for his participation in this conference. Please join me in welcoming Lord Chief Justice of England and Wales. (Applause)

LORD CHIEF JUSTICE PHILIPS:

(Standing Ovation)

Thank you all very much and thank you, Don, for that advocacy which provoked that astonishing response. (Laughter) It is a great honor and pleasure to be here this evening, giving this Austin Owen Lecture – a particular pleasure to be doing so in the presence of Dr. Julius Hopkins, his daughter, whom I greatly enjoyed talking to before dinner. Justice Breyer rather mischievously spent the dinner trying to persuade me to talk **San Guan**, but I propose to start a little bit later.

About four months ago I was dining with many who are here this evening in my Inn in London, the Middle Temple. It was 400 years to the day that there had set sail from London three tiny ships, bound for Virginia to found a colony pursuant to a Charter granted by King James on 10 April 1606. They made landfall at Chesapeake Bay on 26 April 1607. The expedition was not an unequivocal success. Those who embarked on it hoped to find gold. Instead they found disease, and most of them died.

The expedition was attributable in large measure to the enthusiasm of one of my predecessors as Chief Justice, Sir John Popham, and had the support of distinguished members of my Inn. I do not know how many lawyers there were among the very first settlers, nor how concerned they were with the rule of law. One of them, a lawyer from the Middle Temple, George Percy, was to become a governor of Virginia. Another member of my Inn, Sir Edwin Sandys, was responsible for the Virginia Charter of 1606. This gave the first colonists “all the Liberties, Franchises and Immunities of English subjects,” but no political rights. Much more significant was the subsequent “Great Charter” of 1618 for which Sandys was also responsible. This entitled the settlers to institute a representative government under which they were assured freedom of speech, equality before the law, and trial by jury. This and the subsequent charters of the American colonies laid the ground for the Constitution of the United States.

Lawyers trained at the Inns of Court in London - for it became common for the leading families in the colonies to send their sons across the Atlantic for this purpose - contributed greatly to these charters and, indeed, to the Constitution. Five members of my own Inn were signatories to the Declaration of Independence and no less than seven among them signed the Constitution. It is that Constitution that embodies the rule of law in this country, and so we are celebrating this week the sowing of the seeds of the rule of law in the United States, seeds that were exported from my own country.

I first set foot on the eastern seaboard in time of war when I landed in New York, as an evacuee in 1940. In times of war, courts tend to be particularly diffident about questioning steps taken by the Executive in the interests of national security. In the infamous case of *Liversidge and Anderson*, the House of Lords held that the Home Secretary could not be required to provide any justification for his exercise of the right to detain a man without trial because he believed that this was necessary because of his hostile associations. The diffidence persisted in England even after the war.

In 1977, the Secretary of State served a deportation notice on a Mr. Hosenball, a United States citizen working as a journalist, on the ground that he had sought and obtained for publication information harmful to the security of the United Kingdom. When he refused to provide any details of this allegation, Mr. Hosenball sought judicial review of the decision. This was refused. This is what the great Lord Denning had to say - I won't do his accent:

‘There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task. In some parts of the world national security has on occasions been used as an excuse for all sorts of infringements of individual liberty; but not in England. Both during the wars and after them, successive

ministers have discharged their duties to the complete satisfaction of the people at large.”

Deference to the Executive has not, I believe, been a notable feature of American jurisprudence. The difference between our two jurisdictions is, of course, that in this jurisdiction the rights of the individual are embodied in and protected by a written Constitution. And you have a Supreme Court with jurisdiction to protect those rights to the extent of striking down legislation that is unconstitutional. In my jurisdiction the Constitution is largely unwritten. Parliament is supreme and the courts cannot refuse to give effect to legislation on the ground that it is unconstitutional.

Both our countries are now facing a new kind of conflict – that created by international terrorism. Yet despite the threat of terrorism, the United Kingdom courts are not showing the traditional deference to action taken by the executive in the interests of national security. The change in stance is largely attributable to the Human Rights Act 1998, which came into force in 2000. This act was passed by the present administration soon after they came into office. The act allows individuals to invoke the provisions of the Human Rights Convention in disputes with government and requires judges to enforce Convention rights.

We cannot strike down legislation that conflicts with the Convention, but we can make a declaration that it is incompatible with the Convention. This is just about as good, because the government up to now has always responded to a declaration of incompatibility by changing the offending law. More significantly, we now have to scrutinize Executive action to ensure that it does not infringe human rights. We can no longer hold that actions taken in the interests of national security by the Executive are **now** justiciable if those actions are alleged to infringe on individual human rights. The consequence of this has been a series of decisions of the courts, holding unlawful legislation, statutory instruments, and Executive action designed to address the problem of terrorism.

The Human Rights Convention, as interpreted by the European Court at Strasbourg, poses a problem for the Government. The court has ruled in a case called *Chahal v. United Kingdom* that,

‘Tis contrary to the Convention to deport an illegal immigrant if he will be at risk of torture or inhuman treatment if you send him home, however great a threat he may pose to your security.’

At the same time, it is contrary to the Convention to detain someone without trial simply because you have reasonable grounds to believe that he is involved in terrorism. The Convention permits a country to derogate from the latter obligation, but only, I quote,

‘To the extent strictly required by the exigencies of the situation in time of war or other public emergency, threatening the life of the nation.’

After 9/11, the British government decided that the threat of terrorism in Britain was such as to amount to a public emergency threatening the life of the nation and purported, on that ground, to derogate from the Convention. It did so in respect of and again I quote,

‘Foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism or of being connected to terrorist groups and who are a threat to the security of the United Kingdom.’

Relying on this derogation, Parliament then passed an anti-terrorism act in 2001 that permitted an alien to be detained indefinitely if the Home Secretary reasonably suspected that he was a terrorist and believed that he was a threat to national security, but was unable to deport him because he would be at risk of inhuman treatment in his own country. The Home Secretary immediately certified that a number of aliens fell within the scope of the new act, and they were locked up. It was made plain to them that if they wanted to go back to their own countries they were free to go. They did not do so.

What they did was to exercise a right of appeal for which the act made provision. The case is known simply by the initial of one of the appellants as A. The procedure governing this appeal was unusual, involving a special judicial tribunal, known as SIAC, with special powers. Evidence, disclosure of which would have adverse implications for security, can be put before SIAC as “closed” material. This is not disclosed to the terrorist suspect. It is disclosed to a special advocate, whose duty it is to protect the suspect’s interests; but once he has seen the material, the special advocate is no longer permitted to communicate with the suspect. This procedure was challenged in a subsequent case, which came before a division of the Court of Appeal, over which I presided. It was argued that it infringed on the suspect’s Convention right to a fair trial. We held that, in the particular circumstances, the procedure satisfied the test of fairness, but this is a point on which the House of Lords has yet to rule.

Let me return to the case of A. The appeal of the alien terrorist suspects detained under the 2001 Act went right up to the House of Lords. They sat nine strong, instead of the usual five. The appeals were allowed. The majority of the Lords accepted that derogation from the Convention was possible in that there did exist a “*public emergency threatening the life of the nation.*” They held, however, that the terms of the derogation and of the act were unlawful in that they went beyond what was strictly required by the *exigencies of the situation*. Three factors weighed particularly in their reasoning.

The first was the importance that the United Kingdom has attached since, at least Magna Carta, to the liberty of the subject. The second was that the measures only applied to aliens. There were plenty of terrorist suspects who were British subjects. How could it be necessary to lock up the foreign suspects without trial if it was not necessary to lock up the British suspects? Finally, the measures permitted those detained to opt to leave the country. If they were so dangerous, this did not seem logical, for they would be free to continue their terrorist activities

overseas. And so, the House of Lords quashed the Derogation Order and declared that the relevant provisions of the Act were incompatible with the Convention.

Lord Hoffmann alone did not consider that the terrorist threat amounted to a *public emergency threatening the life of the nation*. In a *Churchillian* dissent he said,

‘The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve.

This statement was received with enthusiasm by the liberal groups, but not by ministers who considered that it violated the rule that a judge should not descend into politics.

Parliament’s reaction to the Law Lords’ decision was to pass a new act: the Prevention of Terrorism Act 2005. This, among other things, empowers the Secretary of State to place restrictions on terrorist suspects by making them subject to Control Orders. The restrictions must not, however, be so severe as to amount to deprivation of liberty. A number of procedural safeguards were imposed by the act, including automatic review of Control Orders by the court.

The first batch of control orders imposed by the Home Secretary required the suspects to stay confined within small apartments, for eighteen hours a day, and placed restrictions on where they could go and whom they could see in the remaining six hours. These orders were challenged and a division of the Court of Appeals, over which I presided, upheld the finding of the judge of first instance that the orders were unlawful, in that the restrictions that they imposed amounted to deprivation of liberty. The Home Secretary immediately imposed modified control orders in place of the old ones. These are not nearly as restrictive, and are specifically tailored to meet the situation of the particular suspect.

There are currently sixteen orders in force, of which seven relate to British subjects. On fifteen occasions modifications have been made at the request of the suspect. On four occasions such a request has been refused. The most significant difference between these and the previous control orders is that the curfew periods have been reduced to either fourteen, or in some cases twelve, hours a day.

There have been successful challenges to two of these new orders.

The first was by a terrorist suspect known as *E*. He is one of the original detainees, and so has been subject to preventative measures for five years. In a very lengthy judgment Judge Beatson reached the conclusion that the cumulative effect of the restrictions imposed upon *E* amounted to deprivation of liberty, and so he quashed the order. The day before I left to come to this conference, the same judge quashed a second control order on the ground that its effect amounted to inhuman and degrading treatment. I have not yet seen that judgment and, in any event, I cannot comment on these cases, for they may well come before me in the Court of Appeals.

What I can do is to recount a comment of Charles Clarke, who was the Home Secretary at the time of some of the events that I have been describing, when giving evidence to a Parliamentary Committee. He said:

‘The judiciary bears not the slightest responsibility for protecting the public and sometimes seems utterly unaware of the implications of their decision for our society.’

This added fuel to a picture that the media likes to paint of the judges being at war with the executive. It is a false picture. Our relations are, in fact, good and I think that ministers understand, as perhaps the public does not, that judges are simply doing their best to apply the

laws that Parliament has enacted, which include the law that requires them to give effect to the Human Rights Convention.

Debate about the justification for resorting to exceptional measures to deal with terrorism often focuses on the extreme case of the use of torture. What if a bomb has been placed that is likely to take countless lives and a terrorist has been caught who knows the location of the bomb? In such a situation cannot torture be justified in order to induce the terrorist to disclose where the bomb is hidden? The classic answer is that the law can never justify the use of torture, but in a situation such as that the Executive might be forgiven for acting in a manner that was unlawful.

A more difficult issue arose in the second round of litigation that had led to the Lords' famous decision in *A*. The issue was whether a court can receive evidence that has, or may have, been obtained by the use of torture. The Court of Appeal held that, in the circumstances of that case at least, it could, provided that the United Kingdom authorities were not party to the torture. On appeal to the House of Lords, sitting seven strong, the decision of the Court of Appeals was unanimously reversed. Their Lordships held that evidence obtained by torture was not admissible in an English court, whoever had done the torturing.

There was, however, a critical issue on burden of proof: Should evidence be shut out whenever there is a risk that it may have been obtained by torture, or only where the court is satisfied on balance of probabilities that it has been obtained by torture? By a slender majority of four to three, the Lords decided that the latter was the position. This means that the English courts will admit evidence where there is a possibility, but not where there is a probability, that it has been obtained by torture.

At the end of last year, two gentlemen called Ahmad and Aswat were resisting extradition from the United Kingdom to the United States on the ground, inter alia, that they might find

themselves subjected to *extraordinary rendition*, that is, transfer to a foreign state in circumstances where there was a substantial risk that they would be subjected to torture. This submission required the English Court to consider evidence as to the alleged practice of the United States, an area where in the past the Court would have been reluctant to trespass. The Court considered quite a body of evidence and was not reassured by a statement from a federal prosecutor that,

‘The United States does not expel, return, or extradite individuals to countries where the United States believes that it is more likely than not that they will be tortured.’

The Court, however, was reassured by the fact that there was,

‘No evidence whatsoever that any person extradited to the United States, from the United Kingdom or anywhere else, has been subsequently subjected to rendition, extraordinary or otherwise.’

Continuation Lord Chief Justice Phillips

... Have no jurisdiction over aliens detained at Guantanamo.

After reviewing both English and United States Authority, we commented:

‘We do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles, recognized by both jurisdictions and by international law, Mr. Abbasid is at present arbitrarily detained in a *legal black hole* . . . What appears to us to be objectionable is that Mr. Abbasid should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter.’

And, of course, the position did change when, by a majority of six to three, the Supreme Court in *Rasul v. Bush* ruled that foreign nationals held at Guantanamo could use the United States court system to challenge their detention.

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challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter. And, of course, the position did change when, by a majority of six to three, the Supreme Court in *Rasul v. Bush* ruled that foreign nationals held at Guantanamo could use the United States court system to challenge their detention.

I have described how, in England, the courts have repeatedly upheld challenges of actions taken by Parliament and the executive that are aimed at dealing with terrorist suspects. There are parallels between what has been happening in my jurisdiction and what has been happening over here. The Government can derogate from the Human Rights Convention if this is necessary to deal with a state of emergency threatening the life of the nation.

After its first unsuccessful attempt it has not tried to do so again. The U.S. Constitution prohibits Congress from suspending the ‘Privilege of the writ of habeas corpus’ save where in cases of rebellion or invasion public safety may require it.’

Congress has not suspended the writ of habeas corpus.

The issue, essentially has been, how far the Legislature and the Executive can lawfully go without taking this step. I followed with great interest the litigation in relation to the Detainee Treatment Act, the Military Commissions Act, including a series of decisions of your Supreme Court; the last of which on April 2, left open the door for a further hearing in due course.

What we have been seeing in each of our jurisdictions is a conflict between the desire of the executive to take certain preemptive measures against terrorist suspects and overriding legal principles, in our case the European Convention on Human Rights and in yours the Constitution of the United States. In each case the courts have been called on to perform their duty of upholding the rule of law. Not everyone has appreciated this, giving that word each of its meanings.

The desirability of preventing terrorists from blowing up innocent citizens is one that we would all induce. But terrorism is spawned by ideology. John Reid, our Home Secretary, in a recent speech said that,

‘we were living through what was at heart an ideological struggle: a struggle between democracies and the core values of a free society on those who would want to create a society which would deny all of the basic individual rights that we now take for granted on the other.’

At a lecture given at the London School of Economics last year, Shami Chakrabarti, the Director of the human rights group Liberty, observed, *The philosophy of post Second World War democrats is that of fundamental rights, freedoms and the rule of law.* This is the legacy of Eleanor Roosevelt and of Winston Churchill: *If our values are truly fundamental and enduring, they have to be relevant whatever the level of the threat.*

I share those sentiments, and would suggest that the legacy goes back further. It goes back to the day that the first settlers, whose arrival we are celebrating this week, landed in Chesapeake Bay.

Respect for human rights must, I suggest, be a key weapon in the ideological battle. Since the Second World War, we in Britain have welcomed to the United Kingdom millions of immigrants, many of whom are refugees from countries whose human rights were not respected. The prosperity of the United States is built on immigrants who have been welcomed from every corner of the globe. It is essential that they, and their children and grandchildren, should be confident that their adopted countries treat them – and those who are nationals of the countries from which they have come – without discrimination and with due respect for their human rights. If they feel that they are not being fairly treated, their consequent resentment

will inevitably result in the growth of those who, actively or passively, are prepared to support the terrorists who are bent on destroying the fabric of our society. The British Human Rights Act and the United States Constitution are not merely their safeguards. They are foundations of our fight against terrorism.

Thank you. (Applause and Standing Ovation)

HOST DEAN SMOLLA: Lord Chief Justice, thank you very much for those elegant and thoughtful remarks. I suspect that there were few in the room that were not struck by the fact that there is an extraordinary parallelism between the struggles in the United Kingdom and to strike the appropriate balance between civil liberties and the War on Terror, and the struggles here in the United States and many of the other nations represented here tonight. There is no doubt that all of us in the room, I think, are committed to fighting the War on Terror because nothing could be more an antithesis to the concept of the rule of law and the concept of terrorism. As we heard this afternoon and as you (Lord Chief Justice Phillips) so elegantly described, we are all also committed to the notion that what we truly share is a commitment to constitutionalism, the independence of courts, and to our use of our tradition of the rule of law to try to strike that balance, when it does not give away the very things we are fighting against. So, thank you for those remarks; thanks to all of you for being part of this conference and this evening. Drive safely home and we are adjourned.

Next sessions are cutaways of participants mingling in dining area and of Mr. Wenli's speech.

Please see Disc 3.

INTERVIEW OF XU WENLI (Daughter translating)

QUESTION: How has the legacy of democracy that began in Jamestown 400 years ago influenced your efforts to establish a **inaudible** Chinese Democratic Party?

MR. WENLI: We have seen that – We know that Jamestown is where democracy, the roots of democracy, emerged 400 years ago, and the fact that he has been able to survive and propagate itself all throughout America, causing America to become very prosperous and not only prosperous but free country is a strong example and inspirational model for many of us in China. A lot of people may think that it requires a violent, strong hand regime in order to enforce stability, and in order for people to have jobs. But we see that this not the case in America and this is very inspiring for us in China.

So, a lot of us visiting China are very aware. People like Jefferson, Washington and Lincoln, who have laid the staples of foundations of democracy for America. We know that Jefferson, of course, was instrumental in starting America's Declaration of Independence, and we were very honored to be able to stay in the Jefferson Hotel yesterday. (Laughter) I was very thrilled. According to my knowledge, Virginia remains one of America's hottest critiques today, and so it has done well in keeping the tradition of being a good critic and also upholding its right to exist as a state itself, and independent mode of thinking. So he saw the deciding vote in the mid term elections last year – was here in Virginia. (Laughter)

Yes, I'm concerned. My focus for China, we are going to have a democracy but this democracy has to be based on the rule of law. We are going to learn from America that freedom and democracy, yes, is important but it is not everything. You need to have it based on the rule of law. We know that, to a certain extent, China, yes, we have had rules in the past. In 1911 when Mr. Sun Yet Son established the first Republic of China there was, to a certain extent, a rule of law in China but that was not complete. And in 1947 we had the Nanking Constitution, which was, again, an improvement and a step towards achieving this rule of law, but, of course, we know that was destroyed in 1956 after the Communist Party came and

destroyed all ideals of democracy. So, now, our goal is to build a China based on the rule of law and create the third republic.

So we learn, take a leaf out of America's book. Number one, we are going to learn that everybody should be born equal, and no one person, or organization or government, can laud above a whole society and say that you have a right to live and you don't. He also wants to emphasize the separation of religion from state, so that what ever the people think, what ever they want to do should not fall under any party or group. In other words, no one group, organization, party or government, should be able to laud above the people or society.

QUESTIONER: Thank you very much.

This section shows Mr. Wenli, his daughter, wife, and participants talking and taking pictures. Next section is cutaway of Lord Justice Rix, see disc four. Cutaway of Dean Starr, please see disc four.

INTERVIEW OF NAVAHO PRESIDENT JOE SHIRLEY

QUESTION: What is the connection between Jamestown and democracy?

PRESIDENT SHIRLEY: As I understand it, you know, looking at history, I think this is where democracy was born. From my understanding, as far as I could tell, the people who came across the big water from England did not have a religion, didn't have a government. In fact, they were running away from the government. So, when they banked on the shores of Jamestown or, you know, in America, they did not have a religion – well, they had a religion, I guess, but they didn't have government. Then they found the Natives having a government, you know, government consent, a democratic-type government. So they look at that and they say, 'Hey, the Natives might have something here. Let's see what we can do; can we borrow it, can we use some of it.' Certainly we have made a contribution. I think this is how the

government, the document, you know, of government was drafted, the Constitution, with Native input. I think this is where democracy was born.

QUESTION: Absolutely. That leads us right into my second question. The impact, what do you believe the impact of Native American culture and practices had on the foundations of democracy? You've already begun, but elaborate a little bit more on that.

PRESIDENT SHIRLEY: I think this is where democracy was born; a government by consent, a government, you know, by talking over things and making a decision. The Natives already had that and like I said, the people who came across the big water didn't have a government, and lo and behold we had it and they borrowed it, and now it's a big super country, a democratic form of government.

QUESTION: Thank you so much. That was perfect. That's exactly what we were looking for. Thank you. Now, if you could just give us your thoughts about Native Americans desire for sovereignty?

PRESIDENT SHIRLEY: Well, I am the President of the biggest Native American nation in all of North America. Before the foreigners came across the big waters we were very independent, very sovereign, very fierce and very proud. All of that was taken away, you know, in the course of history and time. And now we would like to have it back because that is the way it should be. In the scheme of the world, in the eyes of the Creator we were created independent, you know, as a people; children of the Holy One. No man has a right to take away the sovereignty of another. We would like to have it back in this country. We want to stand on our own. I feel like complimenting us, helping us, we can get it back. We have been helping every since the foreigners came across. Like today we are helping. I feel like sometimes our dependency is fostered. Native Americans, I think, **inaudible** is deliberate. Of

course, they don't talk about it or put it in those terms, but my soul, like I said, belongs to the Creator. I was created independent, a sovereign person, and we would like to get it back.

QUESTIONER: Thank you. I'm glad you had me ask that question. That was wonderful.

The next session is of some one talking but no visual. Then there is a cutaway of Kevin Gover's speech. Please see disc number six for full version. The disc closes with shots of people walking about campus, having a meal and talking.

Address Elaine Jones

SOCIAL JUSTICE AND THE LAW

PROFESSOR DOUGLAS (?): Thank you, Rod, and welcome to all of you. My job is to be brief enough not to extend lunch, but to take enough time to let you finish those last few bites of your entrée and to await the arrival of desert. I hope all of you who have come a long distance to visit us here in Richmond will take the opportunity to enjoy a tour of our campus and our law school. If you take the time when you are back at our law school, and wander up the stairs there right next to the atrium, up by our moot courtroom, where are programs have been held you will see a lineup, for the most part, of very old and somewhat dusty portraits on the wall. They are primarily portraits of dead deans. (Laughter) It's kind of an austere looking group, pretty severe, strict image. As you walk down the hallway there is one portrait, however, that is not the portrait of a former dean or professor of the law school. It is right at the end of the hall, it also happens to be the largest portrait in that gallery.

It is one of those portraits that if you stand in front of it, it looks you right in the eye; and if you move the right – I don't know how these things work – but if you look to the right it still looks you in the eye, and if you look to the left it does the same thing. It is a portrait with a steady gaze that to me says, 'Pay attention, I have something to say.' It is the portrait of Oliver Hill. It is special to us in the law school not because of whom Mr. Hill is and what he means to this community, but because of how that portrait got there. That portrait got there because a group of our law students, a couple of years ago, decided that we should have such a thing. And they put together a fundraising program and with the assistance of John Stubbs, my colleague, commissioned the portrait and put it in our law school. To me it stands as a symbol that this new generation of lawyers that are coming through our law school recognizes the great

gift that they have been given by Oliver Hill, and the continuing challenge he has laid before all of us: the challenge to live our professional lives dedicated to a rule of law founded on equal justice.

And so I think it is especially fitting, as we celebrate the 400th anniversary of the transmission of that rule of law here to America at Jamestown, that we celebrate the 100 years of the life of Oliver Hill. It is hard to imagine anyone better suited to do that than our speaker here today, Elaine Jones. Elaine was born not too far down the road in Norfolk. And I promised her I would not give a long introduction which is hard to avoid doing since I started at birth (Laughter) That didn't come out right (laughter) and it is time to cut off the Americas for that part (Laughter) We'll talk about that later.

Elaine got her degree – I better get going, huh? Elaine got her degree in political science from Howard University, after which she spent several years in the Peace Corp, primarily in Turkey. She then entered the law school at the University of Virginia as member of the class of 1970, where she graduated as the first African American woman ever to have graduated from that law school. She, at that point, made a career choice to turn down a variety of lucrative offers, Wall Street firms amongst them, and instead to dedicate her life to the same kind of service that Oliver Hill's example has laid out for us. She joined the staff of the Legal Defense Fund of the NAACP, where she spent virtually all of the rest of her professional career, well over 30 years. She was to become president of that organization in a position she held for more than a decade until her retirement in 2004. She is, like Mr. Hill, one of the nation's leading advocates of equal justice under the rule of law. And we are privileged to have her as our speaker today. Ms. Jones. (Applause)

ATTORNEY ELAINE JONES: He's afraid I'm going to slam him (Laughter), as he should be.

No, but thank you so much, I really appreciate that introduction, Professor Douglas, interim dean to be - a wise choice; a wise choice.

I have the privilege of being in a room full of lawyers, law students, and others who are close to the law, with no red, green or yellow light in front of me. You are on a tight time schedule and I am supposed to give this lecture, also on a subject about which there can be some disagreement, but since I have the mike, oh, yes, it is my point of view that I get to expound with no questions and no responses. It is a wonderful position to be in; thank you University of Richmond for this opportunity. All lawyers should have it every once in a while.

I also want to thank the University for organizing this Commemoration. This is a lot of work, putting together a conference like this. I was at the dinner last night, superb. The sessions, I know you enjoyed them. You have had great speakers on great topics. Your co-chairs, Justice Donald Lemons and Dean Rod Smolla, deserve special recognition by their service contributing to this historic event. I want to thank Dean Roberta Sachs, Professor Jonathan Stubbs, and student assistants Kristen Johnson and Emmet **inaudible** who have been particularly helpful to me. It is a delight to meet all of you and to see my niece, Candace, here who is clerking for Judge Roger Gregory this year. And so she sneaked over from the courthouse. I know he doesn't even know she's sitting up here but now I've told the world --. Also, it is good to see Judge Jimmy Benton. Jimmy and I were the Blacks who represented the 100% black participation in the class of 1970 from the University of Virginia Law School.

You know, it is very interesting about that class. Jimmy and I were both from Norfolk, Virginia, and we were in junior high together and high school and I think Virginia just has a way of, you know – the person before us was also from Norfolk. So maybe we can trust these people from Norfolk to come up here and they may know how to act, and since we are having

this *experiment in desegregation*, you know, we want to increase our odds that it will go well. So they kept going back to Norfolk.

I was the first African American woman to graduate and my sister, Candace's mother, was the second. She came out in '72. I had no other sisters, so, Virginia then had to go elsewhere. You know, it is very interesting about these social justice issues. I was in Turkey when I applied to law school, and Virginia then had the policy, as many of our southern states did, if you qualified to go to a public institution then they would pay your way to go to a law school of your choosing, to which you could be admitted. Patricia King, who is now a tenured faculty member of Georgetown Law School, was a couple of years ahead of me in college. She applied to Virginia; Virginia did not admit her and paid her tuition to Harvard. So, then I applied to the Peace Corps. I said, "Elaine, you are on your way to Harvard, you know, or be a test case or do something but maybe Virginia is going to reach down in its coffers and pay your way." Virginia called my bluff and admitted me. I learned a lesson from that. I had to say, "Alright, you applied, come here and show us what you can do." And you have got to be willing to do that. You step out there, you are going to challenge a tradition or a practice; you have to make sure that you can measure up. So, I decided to go to Virginia, and it was an experience for both of us. They subsequently brought me back, several years later, and gave me the *Jefferson Medal*. They do not give an honorary doctorate, but they do give the Jefferson Medal in Law, and we had the big dinner at Monticello. And I said, 'Oh, Mr. Jefferson, I know you would be pleased. I know you would be pleased; I know you are supportive.' (Laughter) A couple of years ago I went back and gave the commencement. The University of Virginia Law School is truly my alma mater.

I want to thank you on this occasion for honoring an extraordinary human being, attorney Oliver White Hill, Sr., on his 100th birthday. Oliver will be one hundred on May 1st, which is

Law Day, and it is only fitting that Law Day is his birthday. You are honoring Oliver for his enormous contributions in the areas of civil and human rights and social justice. Excuse me if I refer to Mr. Hill as Oliver; I take that liberty, and I assure you it is not a sign of disrespect. It is quite the opposite. His name to me is a term of endearment. I have known him and worked with him for thirty-seven years, working on cases with his law firm for many decades. He is a mentor and a friend and I continually take great pleasure in watching the workings of his great mind, and sharing our numerous conversations. Thank you to his step-grandson, Jamaa Bickley-King, for coming with him today. This inaugural *Oliver Hill Social Justice Award* is a high honor and you could not have chosen better. Moreover, I want you to know this opportunity to give the Twentieth Annual Emmanuel Emroch Lecture is greatly appreciated.

I want to thank you on this occasion for honoring an extraordinary human being, attorney Oliver White Hill, Sr., on the occasion of his 100th birthday. Oliver will be one hundred on May 1st, which is Law Day, and it is fitting that that is his birthday. You are honoring Oliver for his enormous contributions in the areas of civil and human rights and social justice. Excuse me if I refer to Mr. Hill as Oliver; I take that liberty, and I assure you it is not a sign of disrespect. It is quite the opposite. His name to me is a term of endearment. I have known him and worked with him for thirty-seven years, and worked on cases with his law firm for many, many decades. He is a mentor and a friend and I continually take great pleasure in watching the workings of his great mind, and sharing our numerous conversations. Thank you to his step-grandson, Jamaal, for coming with him today. This inaugural *Oliver Hill Social Justice Award* is a high honor, you could not have chosen better. But I want you to know that this opportunity to give the Emmanuel Emroch Lecture – which because of time will be Emmanuel Emroch *remarks* – is greatly appreciated. (Laughter)

In the brochure is a big topic, *From Jamestown to Richmond in 400 Years*, just fifty-five to sixty miles down the road. “Elaine, what are you talking about from Jamestown to Richmond in 400 years?” Well, if I am speaking from the perspective of which I was asked to, of African Americans and the rule of law, that gives me about three or four minutes per century (laughter), and then a few minutes to talk about the impressive work of Mr. Hill and how his life’s work has advanced the ball in both establishing new rules and in making existing rules apply more fairly. However, I do not need four minutes per century, to describe the rule of law in the seventeenth and eighteenth centuries from the perspective of persons of African descent in the colonies.

This was an eye-opening experience for me. As a lawyer, I have spent my time looking at legal history from the Articles of Confederation coming forward. You know, looking at the Articles of confederation, and looking at the Constitutional Convention and just coming forward into the nineteenth century. It was an eye-opening experience to go to the historians and look at the period from 1607 until 1787. I mean it was out; I have never had more depressing reading. I said, “Elaine, this is lunch; you cannot put these people in their soup with this.” You read that history and the scholars have taken time to write in painstaking detail what life was like in the colonies for people of African descent. I’m not going to tell you at dinner some of the things that went on.

So, I said, ‘How can I cover those two hundred years, the 1600s and the 1700s, in a way that you can grasp what I am talking about?’ Well, I found an article, published in 1856 by George M. Stroud, in which he looked at all of the slave states and looked at practices from those states, and distilled certain propositions which applied across the board. And these are called Stroud’s – S T R O U D – Stroud’s Propositions of Slavery. Now, I know, you know the details. Everybody wanted slaves. Initially, you had indentured servants, and then you had

some free folks, I know all of that, but let me assure you they are footnotes. I'm talking about the vast majority of folk in Virginia and in the slaveholding states for that two-hundred-year-period. Now, the first proposition from Stroud:

- I. The master may determine the kind, and degree, and time of labor to which the slave shall be subjected.
- II. The master may supply the slave with such food and clothing only, both as a quantity and quality, as he may think proper or find convenient.
- III. The master may, at his discretion, inflict any punishment upon the person of his slave.
- IV. All the power of the master over his slave may be exercised not by himself only in person, but by anyone whom he may depute as his agent.
- V. Slaves have no legal rights of property in things, real or personal; but whatever they may acquire belongs in *point of law* – emphasized – to their masters.
- VI. The slave, being a – italicized – *personal chattel*, is at all times liable to be sold absolutely, or mortgaged or leased, at the will of his master.
- VII. He may also be sold by process of law for the satisfaction of the debts of a living or the debts and bequests of a deceased master, at the suit of creditors or legatees.
- VIII. A slave cannot be a party before a judicial tribunal, in any species of action against his master, no matter how atrocious may have been the injury received from him.
- IX. Slaves cannot redeem themselves, nor obtain a change of masters, though cruel treatment may have rendered such change necessary for their personal safety. Three more.
- X. Slaves being objects of *property*, if injured by third persons, their owners may bring suit, and recover damages, for the injury. – Two more.

XI. Slaves can make no contract.

XII. Slavery is hereditary and perpetual.

You're talking a code. You're talking about a rule of law. This is 1856, on the eve of the Civil War. These propositions evolved over time and it is interesting what even Stroud says about Proposition Five. Proposition Five: 'Slaves have no legal rights of property in things real or personal; and whatever property they may acquire belongs, in point of law, to their masters.' Here is Stroud's comment on Proposition Five. He says:

'Of *negro* slavery, only can this harsh doctrine be affirmed. Among the Romans, the Grecians and the ancient Germans, slaves were permitted to acquire and enjoy property of considerable value, as their own. The Israelites, when in bondage to the Egyptians, were allowed to acquire private property. . . . The Polish slaves, even prior to any recent alleviations of their lot, were not only allowed to hold property but were endowed with it by their lords.'

Then in the end he says, '*I insert various acts of Assembly, which will evidence in what light this subject is viewed.* And then goes on,

'...and in Virginia, if the master shall permit his slave to hire himself out, it is made *lawful for any person* and the *duty* of the sheriff, to apprehend such slave, and the master shall be fined not less than ten dollars nor more than thirty.'

In other words, you cannot hire out your slaves to others, and the slaves cannot earn money and that the slave is property and is chattel. Now, that is what I'm going to say about Stroud. You can take it for what it's worth. If ever you have a free moment and want to look at that period from 1607 up until the Civil War, several historians have written about it. Ira Berlin has a great piece and an author named Degler also has a great piece. The Stroud piece should be read, I mean there is a lot out there, and so it is a very important area of research.

Now, Jamestown in 1607, everyone talks about the slaves coming in August of 1619, but there are some recent historians who tell us that there was a census taken in March of that year, of 1619, and slaves were counted. There were thirty-two slaves at that time already in Jamestown. We do not know when they got there or how they got there, but that is something that the historians are squabbling about now.

From the beginning of the nineteenth century, in the 1800s, it was still repressive. Then we have the Supreme Court in 1856 making sure we understood a slave was not a citizen, in case anybody wanted to think that – especially now that a new nation had been formed in 1787. When the Constitution was written, you know slavery was protected. The Founding Fathers, the fifty-five of them, were very, very smart men. They could have debated the issues in Latin as well as in English. They were planters; they didn't work, and most were well-to-do. They locked themselves in that school room, for those three months, in the hot summer of 1787. And when they came out, **inaudible** told Benjamin Franklin, "well, what have you done, Sire?" And he said, 'well, we have given you a nation if you can keep it.'

So for whatever reason and, I am inclined to think, you know, to give us the Union they had to hold the South. Virginia was there at the table. There were certain protections in the Constitution that slavery was given; yet, they never used the word "slavery." So when the word "property" was used they were referring to slaves, who were chattel and property. They protected the importation of slaves for 20 years, from 1707 [sic] to 1808. No Congress should pass no law which could affect the importation of slaves for that period of time. Slaves in the document were three-fifths of a person. If a slave escaped, we were to use our resources – the federal resources – to return him to his master; that was a constitutional obligation.

Then we were faced with a Civil War, and there is a lot of discussion about why the war was not over slavery, it was over economics. Slavery was an institution that the South

depended on for its labor, for cotton and tobacco, and all of that, and you know it wasn't really about slavery. It was about the economic productivity of the region, and we need to understand that. But you can understand if I have a personal attachment to it, and I cannot quite detach myself from, the idea of slavery as a brutalizing institution.

The colonists moved from the period of indentured servants in the 1600s, whereby 1660 or 1670, they had moved to a period of slavery. They also made clear that there were to be no alliances between the Native Americans and the slaves and Whites, because if a slave were to escape and come back, you know, they caught him, the slave would get life, be a slave for life; whereas the other indentured servants, if they were White, would get a term of years – four to five years added to their sentence. If a slave were to escape with someone else, that person's sentence was doubled usually when they returned. They made it a point to make sure you kept those peoples separated.

There was a moment of hope – and that's what I noticed in the Supreme Court. Congress would make one step forward and then we will take five back, sticks and starts. It is rare to get Congress, the Executive Branch and the Courts on the same page, at the same time. The only time that has happened in this country in advance of race relations was in the '60s. You had the Courts, the Congress and the Executive Branch all on one page. That's why you get these laws passed and signed into law, and you did not have to worry about overriding vetoes and all of that. But during the 1800s the problem was that after we had the Civil War and we were putting the structure in place, we got those important amendments; the Thirteenth, Fourteenth, and Fifteenth Amendments.

It was clear what the 39th Congress was trying to do with the Fourteenth Amendment. The Thirteenth Amendment was in 1865, free the slaves; in 1868 the Fourteenth Amendment, confer citizenship, because *Dred Scott* said we didn't have citizenship in 1856. There was a

big fight over the Fourteenth Amendment because the women, who did not have the right to vote, were upset with the Fourteenth Amendment because that was the first time word “male” went into the Constitution. The Fifteenth Amendment in 1870, the right to vote. So you say, ‘This is progress. This is the rule of law.’

You know, but as soon as we got those amendments then the deal was struck, because you had the troops in the South protecting the newly freed slaves, and then the Hayes-Tilden Compromise – you know all that – in 1876, by that time there was no more protection. And what happened? At that point, after 1876, 1880, the Supreme Court got back in the game. And everything Congress had tried to accomplish with the Fourteenth Amendment the Court took back, in two critical Supreme Court cases: the *Slaughter-House Cases* in 1873 and the *Civil Rights Cases* in 1883, limited the meaning of the Fourteenth Amendment, limited the reach of the Privileges and Immunities Clause.

So, here we have a 20 year period of growth, 1865 until about 1888. Once the protection is removed then we go back to our old habits. And most of the Southern states amended their constitution between 1890 and 1910 – Virginia amended its Constitution in 1902 – taking away hope, just take it; poll taxes, literacy tests. I mean, just trying to take us back to before those Civil War amendments had been adopted. Lawyers know you can have a right on the books, but if it is not enforced, if it is not enforced it is gives you very, very little. It gives you an argument; it does not give you a right.

Here we have, in this final Century, Oliver Hill being born. Three hundred years after 1607, to the year, Oliver was born in 1907, May 1, 1907. When he was born at the beginning of the Twentieth Century, the NAACP was organized two years later in 1909. The anthropologist Margaret Meade tells us, ‘Never doubt that a small group of thoughtful citizens can change the world. Indeed, it is the only thing that ever has.’ Oliver will tell you in a

minute, ‘Elaine, nothing that I did, did I do alone. There was a group of us who cared about this, who cared about this issue, and early on we dedicated our lives to changing it. A problem can seem so big. It can seem huge, and you say well, how can I make a difference? My life as a lawyer has taught me that we can make a huge difference in the area that we care about if we are willing to devote ourselves to it.’ Yes, money is important. And Joe Louis said money is important and I get nervous when I don’t have it. But that’s all right. I did not go to Mr. Nixon’s law firm – Mr. Nixon was President when I left the University of Virginia, and I got a job offer at Mudge, Rose, Guthrie and Alexander in New York, and that was \$18000 a year, in 1970, more money than I had ever seen. You know, but then I did not understand the art of negotiation, because once I said no the person behind me got that job, and I should have negotiated with him lifetime contributions **inaudible** (laughter), I learned that later in life.

Getting back to Oliver Hill. Oliver said, in his bio, ‘The thing that made me determined to go to law school was actually learning that it was the Supreme Court that had taken away our rights; and I saw no hope of regaining them through the political process prevailing in the late 1920’s. At that time, it was not even possible to get Congress to enact legislation to make lynching or murdering Negroes a crime. Therefore, I determined to go to law school, become trained as a lawyer, and endeavor to get the Court to reverse its previous error, its 1896 decision in *Plessey vs. Ferguson*, in which the Supreme Court told us “separate and equal.” We had the separate, but we never had the equal.

Oliver committed himself to that, and it is interesting how it was done. To overrule *Plessey v. Ferguson* was a twenty-four-year process that started in 1930, Howard Law School. Justice Louis Brandeis told the President of Howard, Mordecai Johnson, at the time in 1929, “I can always tell when a Negro lawyer files papers in the Supreme Court, because when you read it I can tell.” That stung Mordecai Johnson and he said, ‘I’m going to change this law school from

top to bottom.’ And what did he do? He found a brilliant, brilliant young man who was the architect of the entire legal strategy about legal campaigns and how you go about conducting a legal campaign. Charles Hamilton Houston **inaudible** Harvard graduate, 1922, African American, studied under Felix Frankfurter. He received a Masters in political science from Felix Frankfurter and after he received his law degree, he went off to Spain. He was the first African American on the Harvard Law Review. Felix Frankfurter – not Felix, Charles Hamilton Houston in 1924 came back to practice in Washington, D.C., with his father who was teaching at Howard part-time. Mordecai tapped him, ‘I want you to come to Howard and I want you to make this law school into a first rate institution and you have all the support from me that you need.’

Charlie Houston did that, his first class of six people. Who were the first two that was in it; Thurgood Marshall and Oliver Hill? Class, they entered law school in 1930, they had lunch together, and they were friends. Thurgood called Oliver *Peanut* because Oliver ate the peanut cookies and Oliver called Thurgood *Turkey*. I do not know why, certainly, they had food on their minds, Peanut and Turkey. And the kind of quality that they had in that class, by 1931 the AALS and the ABA had fully accredited Howard Law School; one year after they were there, fully accredited, first rate law school.

What happened was Charlie Houston came up with the idea of the litigation strategy, and he trained lawyers. He trained lawyers how to put a record together, how to try a case – because the man was brilliant. Charlie Houston started the early cases in the ‘30s. He sued the University of Maryland for not admitting African Americans. He taught Thurgood and then he went up to the NAACP in New York. Thurgood then followed him up there and became head of NAACP, and in 1943 the NAACP Legal Defense Fund. They started at professional schools, suing professional schools – University of Texas, University of Oklahoma, because

they thought judges would understand the idea of being excluded from a legal education. At first, they started talking about legalizing facilities. Later they moved into the issue of challenging the separate and equal part of *Plessey v. Ferguson*.

But to make this long story short, what happened was Oliver became one of Charlie Houston's and Thurgood Marshall's lawyers who were at home in the field, taking heat everyday with these cases: cases challenging the jury system and cases challenging the equalization of teacher salaries in Virginia. Black teachers got one thing and white teachers something else. It just so happens that both of Oliver's plaintiffs in the teachers' case, Aileen Black Hicks and Emily Seeger Austin – taught me when I was in high school, and they had been Oliver's friends. They dismantled that separate system of paying black and white teachers. His law partner, Spotswood Robinson, became a judge on the D.C. circuit. Outstanding lawyers the firm turned out. But Spot and Oliver went to Prince Edward County, to Moton High School, when those kids called him and said 'we need your help.' They filed that lawsuit which became one of the five cases in *Brown v. Board of Education*.

Well, the same Congress that adopted the Freeman's Bureau, and all of these other institutions to help the newly freed slave, and to say the Fourteenth Amendment was not fair to advance the cause of African Americans and to bring them into the twentieth and twenty-first centuries, is plain wrong. We have to somehow get the Court to see what Justice Blackmun said to the Court, 'In order to get beyond racism, we must first take race into account.'

We have had 346 years of legal ostracism, 346 years. We have had 72 years, from 1970 to the present – Why do I date it 1970; because in a democracy if you don't have the vote, you don't count. We did not get the vote, in a real way, until the 1965 Voting Rights Act, that's when we got it. Any Civil Rights legislation that has passed is going to be challenged in Congress, which it was when the Supreme Court came down with their decision in 1969, so I

date it from 1970. Ladies and gentlemen, that's 42 years; 42 years, plus the 25 years of Reconstruction between 1865 and 1888. That's it. That's it.

I tell people all the time, whites have been an important part of the movement. On our staff, when I headed the Legal Defense Fund, I had to have white lawyers. I did not understand everything. I could not talk to a jury without really trying to understand culturally what might be going through peoples' minds. My affirmative action plan was to make sure I had whites on my staff. My affirmative action plan also was to make sure that my plaintiffs were not only African American, but also whites that had important civil rights issues that impacted us.

When a white employee came to me who was fired because his supervisor told him he had hired too many blacks, I brought him in and sat him down and told him I'm going to give you two lawyers. Luckily, he ended up on a boat in Florida somewhere. He'll never have to work again. I mean, but that is the kind of thing where we are interrelated on these issues. A white female in 1970 – the first employment case before the Supreme Court of the United States, Justice Marshall writing – as a white woman, *Ida Mae Phillips vs. Martin Marietta*. She had three preschool-aged kids and the company told her you cannot work here because you need to be home with your babies. Now that may have been true, but it was not the company's business. If she qualified for the job, it was their job to hire her under Title VII. LDF litigated that case and we won that case for Ms. Phillips. When we were celebrating the win – Ms Phillips was from Georgia:

I said 'Ms. Phillips, why did you come to the Legal Defense Fund?'

She said, 'Well, I know 'Negras' understand this issue'— a lazy 'a' on 'negras.'

I said now, 'Ms. Phillips does not mean to insult me, because she's happy that she has won her case.' See we cannot jump to conclusions about people. We have to take our time and evaluate.

I said, 'Ms. Phillips, why –

She said, 'Well, negras, I know negras.'

I said, 'Ms. Phillips, that word hurts peoples' feelings.

'Oh. Oh?'

'Yes.' I said, 'Now follow me, Ms. Phillips, knee like your knee and grow like you grow, Negro, Ms. Phillips.'

We were in a restaurant in New York talking about 'Negrow' but she got it, she got it. So, I didn't jump to insult. These are things that we learn about each other and that we help each other with, all right.

I am going to end this with one thing about Oliver Hill and all that he has done. You need to know the personal threat that he was under. Oliver practiced in this state until he was 91-years-old. His wife, Bernie, the police came, in 1947, to the house here in Richmond and told his wife that he had been killed. She said, well, I don't know anything about Oliver being killed. The fire department came and told her they understood that her house was on fire, and she told them, well, there is no fire. Much later, the mortician came to pick up Oliver's body, and she said, well, there is no body.

Any way this was just a form of harassment. After their son was born in 1949, she received a call one night from someone stating quote, 'they were *gonna get his ass* that night' close quote. She said she thought they were trying to kill him as he drove through the dark alley into the garage, and she strung an extension cord for seventy-five feet from the back porch and installed a floodlight before he got home. One time he came home and she was sitting on the porch with a pistol in her lap because of threatening calls that had come in. She received call after call about him that he would be attacked or that he would be killed.

Now, this interesting, Oliver just dismisses it in his book,

‘Before our son was born we had been getting harassing phone calls. Consequently, until our son became a teenager, we would not allow him to answer the telephone. We received all types of calls, sometimes ranging from cursing, to threatening calls, to calls in which the caller said nothing.’ Other calls were simply vicious. To get a full night’s sleep before going to bed, my wife or I took the phone off the hook. The phone company raised hell about it,’ he says. ‘However, I told them if they would cooperate and trace the abusive calls the problem would cease. Sometime after six or seven months of taking the phone off the hook each night, we would put the phone on the hook to see if we could sleep through the night peacefully. It never worked. The abusive calls continued from 1947 until I went to Washington in 1961, with the Kennedy Administration, for five years.’

But that is the kind of harassment, and that is why we owe Oliver a debt of gratitude, because from what was solidified in Jamestown, and the Founding Fathers gave us the mechanisms in which we can challenge the system we were under. He is first and foremost a lawyer, one who believes in the rule of law and that this law can work for all of us. So, I thank you this afternoon for having come out and for giving Oliver this award that he so richly deserves. Thank all of you very much.

Presentation of the Oliver Hill Social Justice Award

MS. ELAINE JONES: Now, Dean Smolla and Justice Lemons.

JUSTICE DON LEMONS: This is a resolution establishing the Oliver W. Hill Social Justice Award, and naming Oliver W. Hill as the first recipient. (Reading from plaque) Whereas Oliver W. Hill was born in Richmond, Virginia, May 1, 1907;’

MS. ELAINE JONES: And ‘Whereas Oliver W. Hill completed elementary school in Roanoke and high school in Washington, DC – he was born in Michigan; graduated from the College of Liberal Arts, Howard University in 1931, with an A.D. degree, Howard University School of Law with a Jurisprudence doctorate in 1933; and

DEAN ROD SMOLLA: Whereas Oliver W. Hill was married to the late Berezina A. Walker and they had one son, Oliver W. Hill, Jr., and a granddaughter, Jenay, and

JUSTICE DON LEMONS: Whereas Oliver W. Hill passed the Virginia Bar in 1933, and except for the time when he was serving in the United States Government, he practiced law in Richmond, Virginia, from 1939 until his retirement in 1988, and

MS. ELAINE JONES: He also has a step-grandson who is sitting next to him, Jamar King, OK.

And whereas Oliver W. Hill served on the Armed Forces from June 1943 through November 1945, and from May ’61 through December 1966 was with the Federal Housing Administration, first as assistant to the Federal Housing Commissioner and later as the assistant to the Assistant Secretary for Mortgage, Credit and Federal Housing Commissioner in the Department of Housing and Urban Development, and

DEAN ROD SMOLLA: Whereas, since the mid-1930s Oliver Hill has worked insidiously to secure all rights incident to the first-class citizenship of African Americans.

JUSTICE DON LEMONS: And whereas Oliver W. Hill was one of the founders of the Virginia State Conference of NAACP branches in 1935, and the first such state-wide chapter of the national NAACP, which served as a model for other state-wide organizations created to fulfill the mission of the NAACP,

MS. ELAINE JONES: And whereas Oliver W. Hill participated in 91 civil rights cases involving equalization of salaries for public school personnel, the right to serve on **inaudible** juries, inclusion of African Americans in the program of free bus transportation for public

school children, equalization of public school facilities, protection of the rights of firemen and other railway workers to employment and fair and impartial representation by the statutory bargaining agent; the right to participate in primary elections, the elimination of segregation on common carriers; the use of public places in a nondiscriminatory and unsegregated fashion, including public schools and places of public assembly and recreation; securing African Americans to housing of their choice, and the right to an organization such as the NAACP to assert their Constitutional rights and seek redress of their grievances, free from harassment by legislators or investigatory committees, and

DEAN ROD SMOLLA: And where as Oliver W. Hill has encouraged and helped develop the use of the ballots among minorities, and has sought to stimulate their participation in organized political party activities, including setting an example by, in 1948, becoming the first African American elected to the Richmond City Council since Reconstruction.

JUSTICE DON LEMONS: And whereas Oliver W. Hill served on the first Presidential Committee on government contracts compliance, known later as the President's Committee on Equal Employment Opportunity; and whereas Oliver W. Hill served as partner in the law firm of Hill, Tucker and Marsh until his retirement in 1998.

MS. ELAINE JONES: And whereas Oliver W. Hill has received numerous awards and honorary degrees, including the Presidential Medal of Freedom, which is the nation's highest civilian award; the highest award of the American Bar Association, and the NAACP's Spingarn Medal for his remarkable lifetime achievements in the service of civil and human rights. Now, therefore be it

DEAN ROD SMOLLA: Resolved that the University of Richmond School of Law deems it only fitting, as well as an honor and a privilege, to confer the Law School's first Oliver W. Hill Social Justice Award upon Oliver W. Hill, and further be it resolved that a copy of this

resolution shall be presented to Oliver W. Hill on this 12th day of April 2007, by the Honorable Donald Lemons of the Supreme Court of Virginia, and co-chair of the Commemoration of the Rule of Law, by Rod Smolla, Dean of the University of Richmond Law School, and by Elaine R. Jones, former President and Director Counsel of the NAACP Legal Defense Fund.

Ladies and gentlemen, will you please congratulate Oliver W. Hill. (Applause and standing ovation). Presentation of award was made to Mr. Hill.

MS. ELAINE JONES: Do you want to say thank you?

MR. OLIVER W. HILL: I am. (Laughter) I want to thank everyone who had anything to do with presenting this series of awards (Laughter) You know, I can't think of a better person to have to deliver an award for me because she has been such a wonderful person right down through the line. You know, Elaine won the Oliver Hill Freedom Fund Award **inaudible** by the G.C. Conference of the NAACP branches, and as she mentioned, as having been formed in 1935, and we still in process. But now on that occasion, that's what I'm leading up to. I'm going to quit in a minute. **Inaudible** dedicated the most wonderful speech about the value of one vote; and lo and behold, we all know the value of one vote because we've been suffering from it every since. (Laughter) **Inaudible**. Thank you so much. I dearly appreciate it and I hope to see many of you at the celebration on May 4. Thank you very much. (Applause)

The song Happy Birthday was sang to Mr. Hill. His response to being asked if he would like to make a wish was inaudible but he did say, Thank you, thank you, thank you.

DEAN ROD SMOLLA: Thank you everyone, we will gradually make our way back to the Law School.

Andrew Prozes, CEO Lexus Nexus Group

Rule of Law in International business: A Global CEO's Perspective

Keynote Rory Brady

DEAN SMOLLA: _____ compliment you. (Laughter) I think we are first going to recognize Judge Tacha who may have an announcement for some of her colleagues.

JUDGE TACHA: Well first of all we are privileged that the **American Inns of Court** _____ and the _____ **And we have two more conferences** to go and we _____ questions about when it begin and where you will get your materials. For the American Inns of Court you will get your materials at registration, at 8 o'clock tomorrow morning in the Jefferson Hotel where you should find in the main

DEAN SMOLLA: Well, as I have discovered over the course of the last day, the rule of law is certainly a complex concept, and I think all of us have had our understandings deepened by much of what we have heard. One of things I am struck by is the sense of it being a tapestry, the sense in which the structure of our political institutions, our conceptions of human rights, and the concept of economic prosperity and stability and economic affairs are all interwoven. This afternoon we will focus more on that economic side and on some of the challenges that face us as a global community as we seek to have stability with regard to investment and entrepreneurial investment and entrepreneurial freedom and the ability to operate in world markets. Things that are supportive of stable political institutions and supportive of human rights.

A few months ago, at the American Bar Association meeting in Miami I asked our next speaker, Andrew Prozes, the CEO of Lexus Nexus Group, and one of the directors of Reed Elsevier, if he would hear my plea with regard to this conference and see if Lexus Nexus and

Mr. Prozes would be willing to participate in it and be part of it. It took no convincing. It reminded me a bit of the great scene in the movie Jerry McGuire where he says, 'you had me at the low.' (Laughter)

Mr. Prozes, it turns out, himself a passionate advocate for the rule of law and as someone who works in an international business environment in a major worldwide company that deals with the free flow of information, and also with the protection of intellectual property across international borders. He is acutely conscious of the importance of the rule of law worldwide. As I listened to him it occurred to me that it was very important that one of the perspectives that we bring to the conference would be the perspective of a prominent world business leader, who operates in the rule of law context in a very real sense, in the day in day work of his business. So it is in that spirit that we extended this invitation, and we were very, very delighted that it was accepted.

Mr. Prozes, we are delighted that you are here. Welcome and we are looking forward to your remarks. (Applause)

MR. ANDREW PROZES: Well, thank you, very, very much, Dean Smolla, for not referring to each other as Mr. Prozes and Dean Smolla, but anyway thank you very much for those kind words. You had me before **the alowe because Kirt Sandordf** (Laughter) **inaudible** and had me say yes. I want to thank all of you for giving me the opportunity of saying a few words about the topic that has a great deal of meaning for me, in a personal sense, and that topic, of course, is the rule of law.

I know that the program states that I am supposed to talk about the perspective of a global CEO on rule of law and I'll do that. But it might be appropriate to start with a few words about my childhood perspective. My parents fled Estonia in 1944, and if you don't know where Estonia is then I'll tell you that two days ago, unfortunately, there was a front page article in

the Wall Street Journal that stated that Estonia's number one claim to fame was the place where stag parties and *stagette* parties from the United Kingdom go to have a good time.

(Laughter) That wasn't a very good commercial, at least in my mind, about Estonia. Anyway it is a country of one and a half million people. I am sure you know where it is.

My parents fled in advance of the Soviet Army coming into Estonia. They got onto a boat and the boat was supposed to go to Sweden and somehow some monies changed hands and the boat ended up in Germany and my parents ended up in a forced labor camp in Germany, which is where I was born in 1946. In 1949 hundreds of thousands of people were deported by the Soviets from Estonia to Siberia, and many of them did not come back; many of my relatives. When you go to the graveyard in Estonia where my family is buried you'll see tombstones going back into the 1600. So we had many, many Prozės in Estonia. A lot of them unfortunately ended up in Siberia and didn't come back.

As I was growing up, what I do remember, is my father – on Sunday nights in particular – pounding the table talking about the law, the Soviet laws in Estonia. I saw first hand what those laws meant. It meant, because there was a law that said you couldn't send something to Estonia that was brand new, we had to buy shoes and clothes and we had to – I still remember doing this – we had to drag it through the mud, these things that we were buying to send to Estonia. There was a law in Estonia that said you couldn't send anything that was denigrating about the regime there. And, consequently, letters would arrive to us – in many cases the letters we sent never got there – with great big black sections. There was even a law that said that you could not touch your relatives if they came from another part of the world. So, when my mother who was the first to go in the 1980s, went to visit her relatives they had to meet in a public room in a hotel with other people in the room and they couldn't touch each other.

So what I took away from that whole experience was that there were lots of laws in Soviet-times in Estonia, but there was no rule of law. In many ways, the child-like experiences that I had and the experiences that my family had really shaped me. I think it is fair to say that if my family had not emigrated to a place where there was rule of law – in my case it was Canada – then I would not be standing here giving you a global CEO perspective, because I wouldn't be a global CEO. That gives you a little bit of background as to why the rule of law is something that is a passion for me in my life. So let me talk to what it was that I was supposed to talk about, which is the perspective on rule of law from a global CEO.

As the CEO of a global firm – and in the case, by the way of Lexus Nexus, we have about 14,000 people and of those 14,000 people about 4000 are outside the United States. Contrary to what you might think this is not a commercial for Lexus nexus, so please don't take it this way. We actually don't take U.S. content and ship it over seas. What we do is collect local content, using the local language and using the local people, so these 4000 people internationally do that. By the way, I'll also add that we employ about 3000 lawyers. (Laughter) So we are not unfamiliar with the legal system in any way, shape, or form.

As the CEO of a global firm, I clearly want to do business in countries where there are tremendous up sides, and one of them, of course, is China. But in the case of China, as we all know, there are also some potential down sides. One of them is, of course, that there is a very tenuous sense of the rule of law. For example, at the current time in China we have a distributor who apparently had breached a contract and we were in court. The lawyers that we were using in China are telling us that there is no problem at all; we are going to win the case. It took a little while for us to begin to understand what that actually meant, because the local counsel in China explained to us, well, there is no question that you're going to win the case, but that doesn't mean the party who breached the contract are actually going to stop doing what

they are doing. Besides that you're not going to collect any damages, even if any are awarded, and if there are any damages that are awarded you are not going to collect anyway.

So, when I heard this I said, 'Well, why are we even going through all of this?' But it gives you a sense of what it means to do business in a place like China. The Chinese courts, basically, as many of you know probably better than we do, really do not enforce contracts and put into place non-negotiable terms in the same way as we are used to under, if you will, more-rule-of-law sense. Also, the political process, of course, enters the judicial system, the court process in a much more meaningful way. Right now in China there is a very strong nationalist movement. What that means is that they play that card and decisions tend to favor any party who exhibits more of a nationalistic flavor.

Still staying on China, recently in Industry Week Magazine, the head of the PTO here in the United States, John Dutice, predicted the countries such as China are going to have a very difficult time building a technologically dependent or technologically superior economy simply because they are not protecting intellectual property in the way that they used to. Now this is a fairly big issue for a company like us because we distribute patent and intellectual property information. We get hundreds of thousands of requests everyday through our system for patent information and so forth, that goes into China. It is a bit of a scary thought and concept as to what actually happens with that data and with that information. Chinese politicians tell us – and we spend a fair bit of time with the politicians in China – and they tell us not to worry; all of this is going to get eventually sorted out. But the reality is that 81% of all the goods that are confiscated, regarded as counterfeit and confiscated as counterfeit entering the United States, are made in China.

So, as we look at what we are doing in China, we have a big investment in China, the sense of rule of law is an extremely tenuous term with the China legal system at the current time.

The interesting thing about China is that sooner or later it's going to be in their best interest to conform to WTO more clearly and more forcefully, and to get on board with the same kind of legal processes that we're finding here in the United States and in other parts of the world. Very simply, they want to attract foreign capital and very simply they currently – Chinese companies are currently filing more patents in China for the first time than foreign companies are; which means that increasingly it's going to be more useful and important to the Chinese authorities and for the Chinese government to protect intellectual property much more forcefully than they are today.

So, getting back to this question of economic prosperity' why do companies such as Lexus Nexus take the risk of operating in a country such as China? Well, it would be a little, you would find, disbelieving if I didn't say we're hoping that some day we're going to make some money in China. It looks like its going to be a far ways away, but we think we eventually will. So there clearly is a profit motive and there has to be because a corporation has shareholders and we, of course, have to do what is good for the shareholders. In the case of Lexus Nexus it is a little more complicated for us because of what we do.

I actually think and we in our company think, that we can help move China to a more universally accepted rule of law regime. Perhaps, in a small way, but we believe we can help in that regard. Certainly, when we go to China we get carded by the Ministry of Justice and so forth, encouraging us to come into China, because we make laws transparent; we make cases more transparent, and all of this, we think, is going to move China towards a better – in our definition of better – legal system. Fundamentally, I also believe that what we are doing in China is the right thing for us to do. I don't mean in the profit sense, but I just think fundamentally it is the right thing for us to do in terms of our role in the legal world. I guess, what it boils down to is that I think in our own way a company such as Lexus Nexus, and there

are many companies like us, can in some meaningful way help countries move their legal systems towards more fundamental rule of law. That's true in Eastern Europe and I think it's true in places like China and Russia and so forth.

We can leverage our size of global reach to help establish legal processes in cultures that respect and support the rule of law better, and we do it in many different ways. It's not only the kind of business that we operate, but we do it with our sponsorship and our support of Sealy Institute in Eastern Europe; our support of this Rule of Law Conference; the American Bar Association rule of law initiative, and our support for similar initiatives that are lead by the International Bar Association. I know the companies care so much about the rule of law. Fundamentally, we as corporations could not exist without the rule of law. It's that simple. I think that China and Russia are very good examples. If there wasn't some semblance of rule of law we would not be there, and I think that most corporations would not be there either. In a way it is a self-serving objective that we fundamentally believe that our help and encouraging, and any corporation's help and encouraging, of the rule of law in any country is going to make that country more economically prosperous, and that we are going to be able to operate in those countries.

Corporate economic includity is fundamentally based on trust. Trust in the rule of law as a consistent, non-negotiable foundation of business dealings in any economy, and that's one of the troubling aspects. I think the word currently in China is that we are not sure that we can actually trust what is coming out of the court systems.

The moral contract between corporations and their people, I think, is also another facet of the rule of law. People who live in rule of law societies expect that companies that they work for are going to adhere to the same freedoms and way of life as they enjoy in their non-work lives. Adversely, corporations have expectations that they can protect themselves from anyone,

including their own people; some of whom believe that ethical and legal business practices don't apply to them. And for anybody who operates international companies you do run into issues and you do run into problems in places like Latin America and Eastern Europe.

So, we have a lot of fundamental reasons, as a corporation, to support the rule of law, as well the knowledge that we sell – the practice expertise, legal practice expertise that we sell – has to be legitimate, authoritative and accurate. All of that is key to fundamentally supporting the rule of law. Our information is not accurate and authoritative because we say so, but because it is validated through ongoing analyses and debate by members of the legal profession – in many cases, many of you. And then it is written down, again, by you, many of you. During the lunch hour, right in the lobby, people came up and said, 'By the way we author or I author a book for you.' We are a very proud participant in that overall process. That process that the rule of law really depends on which is openness and a right to debate and challenge legal opinion in whatever way you feel is right. And we recognize that our role in the rule of law process carries responsibilities that go beyond our responsibilities to our shareholders.

A lot has been said about this conference being the 400th anniversary of the first English settlement in Jamestown, Virginia – a little ways from here. Growing up in Canada I did not have the same benefit of the history lessons that you who are Americans have had, but I did a little bit of research and I found out that the first representative assembly occurred on July 30, 1619, and they met in response to orders from the Virginia Company and the orders were, '...to establish one equal and uniform government over all Virginia which would provide just laws for the happy guiding and governing of the people that are inhabiting it.' So 400 years ago, it seems to me, that the first settlers recognized that their long-term survival depended on putting into place a system that really constitutes rule of law. And today we still have many societies who are not yet there, and I believe that all corporations and certainly Lexus Nexus is

one that blazes very strongly, we should do everything we can to help those societies to move closer towards the rule of law.

I am very happy also to tell you that as of 1990 Estonia has full rule of law and that significant progress has been made from the early part of my story. Thank you very much.

(Applause)

DEAN SMOLLA: Andy, thank you for those very thoughtful remarks and before you go I want to present to you this token of our appreciation and remembrance for all that you have done for us, we really appreciate it.

MR. PROZES: Thank you. (Applause)

DEAN SMOLLA: The thought occurred to me that it was a form of international corporate investment that brought the Virginia Company right here to Jamestown. It's a real pleasure for us to take a moment to pause before we get to the next segment of our program, to thank a number of the folks that have been instrumental in making this all possible for all of us, over the course of the last several days. First of all I want to thank once again my colleague, Justice Donald Lemons who has been tireless in his energies in leadership, Justice Lemons. A number of Richmond law students have worked for the last several months, and have worked in the last several days to support this project: Mike Clemons is one of them and I'm sure Mike is here; I saw him earlier, Mike. Christian Johnson and Michelle Studd, who are over here in the jury room.

This conference was administered with a very, very small support staff. It was essentially the Dean's Office at the University of Richmond that did all of the work over the last several months for this, and I am deeply thankful personally and we should all be and I want to introduce those folks to you right now: Jean Dudley is there; next to Jean is Sharon Daily; next to Sharon is Sue Alterelli; and then I am going to skip a person and introduce you to Susan

Shepherd. I can't tell you how many airplane flights have been booked and hotel rooms arranged for and catering decisions made and envelopes stuffed and many, many, many other details. I also will take advantage of the officer who is standing by the door. I am sorry that I don't know your name; can you tell us? (There was a round of Applause after the calling of each name or group.)

OFFICER: Brad _____

DEAN SMOLLA: Well, you and many of your colleagues, outside the corridor and throughout the campus here and down at the Jefferson Hotel, have been absolutely wonderful. We are going to use you as the surrogate to thank you and all of your colleagues who have been involved in our security effort. (Applause)

Finally, I want to thank the two people who have had the putting-on of this conference their full-time job for the last three months, in addition to their actual day job, which we count on them to do, two of our associate deans here, Roberta Sacks and Christine Henderson. Roberta is sitting in the middle of the room here; Roberta, stand up (Applause), and Chris Henderson who is standing here. (Applause) All of us are thankful for all that you have made possible, and we are deeply appreciative and you are welcome to stay.

SOMEONE: We have to get back to work.

DEAN SMOLLA: You have work to do. (Laughter)

It's a real, real treat for us to now be able to welcome our keynote speaker, Rory Brady, attorney General of Ireland, and I am going to call on the moderator of our next panel, my friend Bill Slate to introduce Attorney General Brady. Bill Slate is a graduate of this law school. He then went on to take on many prominent positions of leadership in the American judicial field. He was a circuit court executive for two of our federal circuits, and many other prominent positions of leadership in the world of American law. Most recently he has been,

for over a decade, the CEO and Chairman and President of the American Arbitration Association, which is one of the world's most prominent alternative dispute resolutions entities, with an extraordinary history here in the United States and also in its international arm throughout the world.

When I was designated to be the new dean – it was before I actually became the dean of the law school – but when it was announced that I was the dean in the very first week of that inchoate responsibility I flew to New York to meet with Bill. He was the very first graduate of our law school that I met and I encouraged him to be a supporter of the school and to help bring to our school a broader reach, in terms of its national vision and its international vision. He has been an extraordinary supporter of me personally, but much more importantly of our law school and our university, and he is now, among other things, a trustee of the University of Richmond, bringing his leadership and his expertise to this campus, his alma mater.

I have seen him, personally, in many different contexts as what I consider one of the personifications of the rule of law. One of the things that our panelists will be sharing with us over the course of the rest of the afternoon, after we have heard from the attorney general, is the critical importance of arbitration and mediation as a way of bringing stability and the rule of law almost instantly, in a sense, to the developing world and allowing for the interchange of economic transactions and many other kinds of human interactions through those alternative dispute resolutions. One of the themes that we will hear is the impact of culture and cultural differences and respect and understanding of those differences on that sort of global legal dispute resolution system that is operating out there. So it is a pleasure for me to invite Bill to the podium for the honor of introducing our keynote speaker. Bill.

MR WILLIAM SLATE: Well, thank you very much, Rod. Good afternoon, all. It is indeed a great honor and a privilege for me to present to you the Honorable Rory Brady, SC, the

Attorney General of Ireland, and a member of the Counsel of State of Ireland since 2002. Rory is a graduate of University College Dublin, and he was called to the Irish Bar in 1979 and to the Bar of England and Wales in 1986 and to the Inner Bar in 1996. He is a former Chairman of the Irish Bar Counsel, which I would say is equivalent to being President of the American Bar Association or similar thereto. He has been a Bencher of the Honorable Society of Kings Inn since December 2000.

Rory Brady, I would tell you, is a great friend of the Americas. He just, for example, spent St. Patrick's Day in Buenos Aires, and on yesterday he delivered an important lecture at the University of Virginia Law School. Happily we see him in New York quite frequently. He has also, I would tell you, been enormously instrumental in the development and growth of arbitration and mediation in Ireland, through education, through legislation and through his own quite formidable personal work. His perspective is a global one and we will now have the great benefit of his view on the rule of law from both a public and a private experience. Mr. Attorney General, we welcome you. (Applause)

HONORABLE RORY BRADY: Thank you very much, Dean, Bill, distinguished judges, distinguished guests. I was listening to the last speaker and it occurred to me that in spreading the rule of law throughout the world you have to take cognizance of the clashes of culture, but not only the clashes of culture, but also the clashes of language. Sometimes phrases used in one part of the globe have a different meaning when used elsewhere. Sometimes a phrase that is meant in an utterly **ana dime** way can be taken up incorrectly. I can give you one illustration of where at the highest level of dispute resolution, that is to say before the General Assembly of the United Nations, a word or a phrase used – with the best will in the world and with the best of intention – triggers some consternation.

It related to an Irish politician whose moment of history had arrived. He was standing on the podium addressing the General Assembly. His words, I have to confess were written by some brilliant foreign affairs official. He delivers the paper impeccably. Not a word was missing. Not a word mispronounced. Not a point fudged. He was going down well and he decided, with such wonderful confidence, that he could depart from the script and make his name on the world stage. The debate that was then agitating the General Assembly of the United Nations related to, again, the violent events in the Middle East. Yet, again, appalling loss of life had taken place. The minister, at this stage of addressing a packed house, departed from the script, looked up at the delegations from the various Arab states that were there, and looked over at the delegation from the State of Israel, and one of those great moments urged the Arabs and the Israelis to resolve their differences in a Christian manner. (Laughter)

At this point, this rather urbane civil servant from our Department of Foreign Affairs – you have them in the State Department, incidentally (laughter) – approached this politician, a rather senior politician, after the end of the speech and said,

‘Minister, I think the speech has been received in a mixed way.’

So the minister looked to him and says,

‘Well, what do you mean?’

‘If you just look up there the Arab delegations are waiving their fists at you; if you look over at the Israelis delegation they have their hands in their heads.’

He says,

‘Really, really.’

Minister in that most urbane way that foreign affairs people speak,

‘Your speech has not gone down well with the Arabs or the Israelis.’

So, the minister, his moment of glory having evaporated in the wrong choice of words, reflects upon a wily old ward politician. He had been elected for a constituency in the City of Dublin, looked at this uppity civil servant and said,

‘Well, I tell you this, it may not have gone down well with the Arabs; it may not have gone down well with the Israelis, but it will go down very well with the voters in the City of Dublin.’ (Laughter)

One of the problems affecting the culture and the clash of cultures in litigation is the problem of delay. There are delays in legal systems all over the world. The causes and the reasons that account for that delay are manifold. It can be a tactical delay by one side seeking to put off the evil day. It can be delay because of unavailability of witnesses, the death of witnesses and so forth. It can be delay attributable to rather protractile [sic] interlocutory procedures. Or, as has become more frequently the case, it can be delayed attributable to an overburdened judicial system. I think if there is one thing most legal systems have on the world it is this: they are under severe pressure. That is a product of the rule of law, and it is a product and a consequence that needs to be addressed in a more comprehensive way than has hitherto been the position.

I will address to, in relation to Europe and where we stand in relation to the pressures on the legal system. It is trite to observe that justice delayed is justice denied. But what do we do about it? What solutions do we have? Is there sufficient versatility in legal systems generally throughout the world; perhaps not. But let me do the following. Let me illustrate the problem and the possible antidote to delay, a delay that can undermine the rule of law. We all know that within legal systems some cases are entitled to priority: cases about the liberty of the citizen; cases affecting life and death; cases affecting infrastructure developments that affect the quality of life of people.

At the other end of the spectrum are those who have ordinary commercial disputes, ultimately about money, sometimes the system fails them, sometimes they are left year after year without a resolution. What does the legal system do; what do governments do, appoint more judges? Sometimes it solves the problems, sometimes it does not. But one of the issues that needs to be addressed and that is particularly appropriate for the subject matter of today's discussions is the greater use and greater access to ADR (Alternative Dispute Resolution). This is not a new solution. This is not a new problem of delay. I want to bring you on a slight odyssey back into the midst of Irish History involving an arbitration, involving, dare I say, Algerian pirates, and dare I say a solution to problems afflicting the Irish legal system not long after the foundation of this colony, not long after Jamestown's prestigious role in America and the introduction of the common law.

In 1695 a vessel left the Port of Dublin, called the Ouzel Galley. It was on its way, as part of its trade mission, to the Near East as we then called it. Everyone expected this voyage should be no different from any other voyage. Of course, after a period of three years, it so happened that the vessel had not returned to the Port of Dublin. The worst is feared. Let me put things in historical context. Around that time a vessel could sail around the world in the space of two years, but this particular vessel had failed to return from a much shorter visit, after three years. By way of illustration, Sir Francis Drake had sailed the Golden Pine around the world in two years and was back. But the 37-member crew of the Ouzel Galley had not returned. There was despair in the city of Dublin. There was upset by the owners of the vessel. But there was more upset by the underwriters, because the owner of the vessel put in a claim on the basis that it had been lost at sea. One of the perils insured against had clearly materialized, the vessel, its cargo and its crew was dead. The insurer, the underwriter **inaudible**

repudiated the claim. The matter went to arbitration and was resolved in favor of the owner, in the year 1703.

No one could reasonably have anticipated what then occurred two years later. In 1705 the Ouzel Galley, that had left in the year 1700 – I should say, the Ouzel Galley that had left the Port of Dublin in 1695, triumphantly and victoriously returned to the city of Dublin. What had happened? Let me explain, and then let me tell you the legal consequences that flowed from this rather quaint story.

While traveling down past the French Coast, 10 of the crew developed scurvy; they had to be let off. They took on board 10 additional crew members of the Moorish background. They sailed into the Mediterranean and to their bad fortune, Algerian pirates attacked the vessel, took control of it, ably assisted by their ten Moorish colleagues. Ouzel Galley, with its crew of now 27 Irish and ten traitors as it would transpire, set sail for the Coast of North Africa. One would immediately say why was the Irish crew not simply killed? Well, it was believed, at the time, that it was intended that they would be sold into the white slave trade in Algiers. Remarkably they were not sold into the white slave trade in Algiers. One historians commenting years later on it and speculating as to why this was so, ventured to suggest the following characteristic about my fellow countrymen: ‘Irishmen are an awkward folk to keep behind bars.’ And so it transpired that the crew were successfully kept behind bars eventually gave the truth to that proposition, they escaped, retook possession of the Ouzel Galley, would wait for it on this occasion, they had on board the pirates booty. They returned to Dublin victoriously.

There was a problem. Who owned the valuable pirates booty; the crew? They had a problem; they had failed to comply with the technicalities of the law of Admiralty. The owner of the vessel; well he had been compensated by the underwriters. What title did he have to the goods? The underwriters, those wonderful people who had repudiated the claim and had to pay

under compulsion of law; they, unfortunately, insured the cargo on the outward vessel, outward trip. So, the scene was set for litigation. Difficult, complex, arcane, legal issues went before the Irish courts, and set the year 1700. In 1701 the case was still listed; 1702, well that was a busy year; 1703, I think the judge may have been a bit sick that year; 1704, giving into a little bit tired of what's going on here, and, eventually; 1705, the case still had not been resolved – a five year delay. Just watch that period of five years. I want to come back to it in a moment, about what's happening in the European courts and delays of that duration and financial responsibilities **inaudible**.

Five years down the road the merchants of Dublin had had enough. They had lost faith in the rule of law. That's where delay undermines the rule of law. So, they decided they would band together and they would form an arbitration court, or an arbitration panel, composed of the merchants of the City of Dublin. So, here we had a case which the legal system because of delay had failed. The men of business took into their own hands their solutions. It is striking that within a matter of weeks the award of this arbitral panel was issued. It issued its final award. And if I shall say so, as I shall presently demonstrate, it was one that had all the characteristics of the Wisdom of Solomon.

The merchant classes of Dublin constituting that arbitration panel issued an award which is recorded in the books in the following terms: *It was resolved that the entire of the pirates' booty would form a fund for the alleviation of poverty.* But wait for it, there was a sting on the tail amongst the merchants of Dublin. An interesting case of itself went on for a long time, but where it has the modern day resonance is what happened thereafter. Having been frustrated by the courts, they decided to set up a permanent institutional arbitral body called the Ouzel Galley Society, and it flourished from the year 1705 up until 1888. It disposed of, by way of illustration, from the period 1799 to 1869 three hundred and sixty-four wards. Eventually,

unfortunately, it no longer had a real function to discharge. Part of its charitable duties was disposing of the funds among the poor merchants of Dublin, and it had also along the way developed as a very fine dining society, and it celebrated its dissolution and the distribution of charitable funds, with a sumptuous dinner in Dublin in 1888.

Now, what does that somewhat protracted, somewhat bizarre and somewhat quaint story demonstrate, and what is its relevance today? It demonstrates that if the legal system does not provide an adequate remedy, does not provide suitably fast and expeditious hearing to those who go before the court system they will look elsewhere. That of itself is not damaging, but what is damaging is how it undermines confidence in the courts and in the rule of law.

Let me now explain the difficulties that are arising in the modern day Europe with delay in litigation. And let me start off by saying that the reason imposed on member states of the Council of Europe an obligation under the Irving Convention of Human Rights, to hear litigation and dispose of it within a reasonable period of time. That's no mere pious aspiration. It carries with it, now, a financial obligation. Look what has happened. Member states of the Council of Europe who failed to insure that litigation is concluded within a reasonable period of time face essentially financial fines. The loss attributable to the delay is ascribed to the state as damages by way of compensation for the breach of an international obligation to conclude proceedings within a fair and reasonable period of time.

This doesn't just happen from time to time. There is a very interesting report that was published last year by the European Commission for the Efficiency of Justice, and it dealt with the number of awards issued by the European Court of Human Rights, because of the delay in civil proceedings. There were, in 2004, two hundred and eleven judgments finding member states guilty of their international obligation because of their failure to insure proceedings were heard expeditiously. In that same year, there were only six cases where the allegations on the

claims were rejected by the European Court of Human Rights. That says a lot and it shows that there is this extra burden, there is this extra constraint and this is extra duty in relation to reducing delay. But it gets worse than that.

Within the constitutional structure of European Union, which is our Economic and Political Union, we have essentially two courts at the upper levels of the hierarchy, the Court of First Instance and then above that the Urban Court of Justice. The European Court of Justice, not so long ago, imposed a fine indirectly on the European Court of First Instance because of their delay in dealing with an anti-trust piece of litigation. How long did it take? Dare I come back to the quaint story of the vessel and the Algerian pirates? The case was stuck in the Court of First Instance for five years. The penalty, the breach of anti-trusts behavior by a corporate entity had been imposed somewhere in the order of four point odd million. Because it took so long, because of the uncertainty and the potential damage of that business, the European Court of Justice, the superior court, said that was not acceptable and they reduced the fine by over a million Euro. So, what we see develop in Europe is the specter of financial liability on states. It's a form of accountability for those states if they fail to ensure that litigation is dealt with rapidly.

Now, are we doing anything about this in Europe? Are we concerned amidst other lessons to be learned in relation to what substitutes for court-driven litigation are required? Here it would be disingenuous if I did not identify a number of distinct steps that are being taken at European level:

1. The Committee of Ministers of the Council of Europe have urged greater use of ADR and specifically mediation;
2. The European Commission has specifically recognized the great untapped resource mediation constitutes;

3. The European Parliament, only a matter of a few weeks ago, accepted and adopted the proposition that there should be a directive for commercial mediation in interstate, across border disputes; and
4. The European Council, which is essentially the governing body of the European Union, has urged repeatedly the importance of ADR.

And I think perhaps most significantly, of all we are seeing for the first time at a constitutional level, the imposition of obligations to have proceedings dealt with rapidly. The draft constitution for Europe, which has been approved by 18 of 27 states but ran into trouble in France and in Holland, it makes specific provision and sets out as a constitution objective of greater use of alternative dispute resolution.

Now, where do we go from here; what do we do in terms of disputes and the resolution of disputes? What framework is needed? I think you have start from the very simple premise that is germane to a conference of this nature, and it comes back to the quaint story, and it comes back to the experience we have all had. Citizens have rights of access to the courts; unquestionably, that is so. Citizens have an expectation that when they exercise their right of access to the courts that in those circumstances their cases will be heard reasonably quickly. But the system cannot guarantee that because it is so overworked. So, what is needed, at a governmental level – in my respectful submission – is a recognition and an incentivization of greater use of ADR, whether for arbitration, whether mediation, or whatever. It is in that context, distinguished judges, ladies and gentlemen, that I want to advance for consideration – perhaps not here today, but for further reflection, further refinement – and I am sure it has a bit too many frailties – a framework for the way forward and a framework that has as one of its objectives ensuring that the rule of law is not ultimately undermined and destroyed.

First thing, greater recognition of organizations that encourage, manage and supervise arbitration. Why? What is fundamentally needed is a cultural shift among lawyers, among litigants and, indeed to some extent, among our hard pressed judiciary. Now what is the cultural shift? The cultural shift in addressing this problem, and it is a potential antidote, is a recognition that justice can be obtained outside of the court system, albeit within a legal framework set by the state. How do you achieve that cultural framework? How do you induce a change in procedures, a multiple behavior that have been there for a very, very long period of time?

1. Organizations that are behind emoting, supervising and administering ADR in all its shapes and forms deserve greater legal recognition;
2. There has to be a creation of tax incentives for organizations that discharge the functions. In the last week we have published a new charities bill in Ireland which specifically provides certain fiscal advantages for organizations dedicated to conflict resolution. Why? It is very simple. It is through those organizations that voluntarily people will want to participate in alternative dispute resolution mechanisms;
3. I think, most important of all, and this is the place where I think the court has a profoundly important role. There is no objection, in principle, to incentivizing or dis-incentivizing [sic] people involved particularly in commercial disputes from going to arbitration or, indeed, mediation.

I can only speak about my country. We provide for a statutory form of the award of interest. If you are due money or damages and have been kept out of that for two years or three years, the court has the discretion to award you interest, it is fixed. And in certain occasions where a breach, that is the fundamental predicate of liability in the cases of breach of an

equitable obligation, the court can award what they call “equitable interest” at the commercial rate.

So what we need is a series of incentives to encourage people to go out of the legal system. If they stay in the legal system they take a risk, they may not get interest. If they go out, then there may be an opportunity to get better interest. It has to be brutal as that. It has to be as robust a regime as that if we are to come to grapple with this problem. It is a serious issue, delay. And really what is frightening, from a European perspective, is the paucity of information that there is about delay. The 2006 report of the Commission, the Efficiency or Justice in Europe, had a striking commentary. It’s a comment that is condemnation of many states in Europe. They have no idea what is the period time it takes for cases to go through the courts. A handful of the 47 member states of the Council of Europe were able to give reliable statistics. We don’t know the size of the problem, but we know it’s there. How do we deal with it?

On the global level there is, in my respectful submission, a need for judicial systems of the democratic world to face up to what is a growing problem. I was in Argentina two weeks ago, happily celebrating St. Patrick’s Day, and I like to say, we think the world is composed of two types. I couldn’t believe 50,000 people turned out for a parade in Buenos Aires celebrating St. Patrick, which I found even harder to believe. But it certainly confirmed my suspicion that the world is composed of two types: those who are Irish and, well, those who wish they were Irish (Laughter) Of course, I want to confirm today that you are all, for the purpose of my speech, honorary Irish today.

There is a problem, but in Argentina, for instance, I was talking with one of the senior judges, and he said to me, ‘Our backlog in the Supreme Court is 20,000 cases.’ If I was a Supreme Court judge I would be saying, ‘How do I get out of here?’ You can’t cope and

systems can't cope. Something is going to suffer. Either the quality of justice is going to suffer or the rule of law is going to be undermined by the lack of confidence that will be repose in the legal system.

So with that, distinguished judges, ladies and gentlemen, I want to express my great honor and the great opportunity it has been for me to participate in this wonderful conference. It has been truly intellectually exciting. The contributions from so many distinguished jurists have certainly facilitated me in coming to grips with issues that are American, or issues that we are aware but whose contours are unclear and imprecise. And I think it is wonderful and a great compliment to this university that it has brought together so many people who are interested in these topics, because it is from people like you that the solutions affecting all of our legal systems, of whatever nature will come. And I pay tribute to you, to the Dean, to the Trustees and to your colleagues, in putting together this conference. And with that, ladies and gentlemen, I wish you – Thank you very much. (Applause)

DEAN SMOLLA: We will go ahead and invite the panelists for the next session to come forward, and just take a second or two to pause and shift sets here and move into the final part of the program.

International Dispute Resolution and Cultural Differences

My friends, you are in for a real treat, and I now yield the floor to Jan Paulsson. (Applause)

JUSTICE LEMONS... Very involved, engaged, prominent international arbitrator, who I would tell you in my words – he'll express it in his – has not encountered universality in notions of justice in the rule of law, in his experience, but rather a term I think he may have coined *enclaves of justice* across the globe. This opening discussion, if you will, of the state of the law will be followed by a somewhat more discrete finer point commentary of rule of law implications within the international arbitral regime itself. Now, implicit here is the clear implication that arbitration – and I think the Dean alluded to this – that arbitration can provide parties with the ability to transport – to transport the rule of law into their agreements where the otherwise applicable law would be non-existent or perhaps disadvantageous to the parties to the transaction.

Then after that second discussion, we will serve up to you the coda which may – for traditional legal theorists, traditional judges, traditional practitioners may – may be one of the more challenging forces that you'll have to digest today as we wade into what I suspect is still murky waters, in an examination of the impact of culture on international commercial dispute resolution. In these latter regards, I say challenging because traditionally we, as lawyers, have substantially invoked and confined 'cultural differences' – quote, close quote, to mean a clash of civil versus common law frames of references, period, full stop.

Said another way, I think it is the fact, at least in my experience, that we lawyers adore talking to one another. Occasionally, we might permit a judge, or a full-time professor into the circle, but no other. As the great Prime Minister Benjamin Disraeli once reminded us, we, all of us, live too much in a circle. Well, we have an exceptionally experienced and informed

panel to lead us into these issues and after a very brief group introduction on my part they will address you, *seriatim*, without my further intervention until I invite your questions at the end, and we hope to have a few minutes for your questions.

You will first hear from **Jan Paulsson**, to my immediate left, partner at Freshfields Bruckhaus Derringer, in their Paris office, although he is literally all over the world daily. His academic degrees come from Harvard, Yale and the University of Paris. He is currently the President of the London Court of Arbitration, a judge of the World Bank Administrative Tribunal. He is a professor and holds distinguished chairs simultaneously at a number of prominent universities, including Cambridge, and it is fair to say he is one of the most, if not the most, sought after international arbitrator in the world.

He will be followed by **Barry Appleton** who is himself a quite prominent international lawyer, specializing in international trade and investment law. Barry has served as the lead counsel for investors, in a large number of investor state disputes under the NAFTA and bilateral treaties. His cases span every continent and involve cases involving compensation for wrongful expropriations, breeches of international fairness standards, discrimination and failure to provide a national or most favorite nation treatment. He holds degrees from Cambridge University, Queens University, and the University of Toronto.

Next, you will meet my distinguished colleague, **Richard Naimark**, down to my far right who is the senior Vice President in charge of all matters international including the International Center for Dispute Resolution, which is there international arm. He is the former Executive Director of the Global Center for Dispute Resolution research. He is himself a very experienced mediator and Richard holds degrees from Columbia University and from the University of Rhode Island.

Last, but far from least, you will hear from **Professor Grant Ackerman**, a full speaker who is a Professor of Management at Columbia University, he also holds a law degree. His academic degrees are from Penn State University, the University of Pittsburg, and his PhD is from Columbia. Grant teaches courses involved in his research as well is in the area of managing conflict, within and between firms, cross cultural dispute resolution and organizationally justice.

MR. JAN PAULSSON: Thank you very much, Bill. Ladies and gentlemen, my sole objective here this afternoon is to provoke you and not entertain you. That doesn't mean I'm in a bad mood. I'm very happy to be here and I'm, in fact, in a very good mood. It seems that we live in a wonderful world, or so it seems, when we consider that states all over the world unhesitatingly subscribe to all kinds of declarations and international agreements, forbidding slavery, discrimination against women, child labor, persecution, individuals on the basis of their religious creed or ethnic background, and, of course, everyone is entitled to impartial and transparent justice. If the rule of law does not create rights – what are rights without the rule of law?

So, every state proclaims itself to be *un Estado de derecho*, state of law. That's the very expression Alberto Fujimori had the nerve to use to describe the rule under his rule. This vision is an illusion, worse, it's a fraud. To refer to it as unrealistic idealism would be to let ourselves off too easily; in effect, claiming good intentions. The fact is that we may be participating in what I am attempted to call the 'fraudulent consensus on the rule of law,' at least negligent and perhaps complicit. For what good are these paper declarations? What is the meaning of these high-sounding promises, if the law, in fact, is whatever may be decided at any given time by the agents of despotic tyrants, religious fanatics, or more or less organized criminals; the more dictatorial the regime, the more surrealistically gorgeous the constitution.

What good is it if judges are paid or intimidated by the powerful or, if less dramatically but perhaps more insidiously, the courts simply don't work. We bear a heavy responsibility if we spend our time fiddling with pretty text while the world burns. I like to think of myself as an optimist, and I promise you that the second part of my remarks are intended to be constructive and helpful, but I am far from finished with doom and gloom. Two insights, I venture, will help us to see the fraudulent consensus for what it is.

First, our model for the global development of the rule of law may be flawed and counterproductive. It maybe harmful to consider that the rule of law is the norm and that it is sufficient to correct deviations from the norm. We may be deluding ourselves when looking at human institutions which purport to deliver justice, if we react with disappointment and surprise, whenever we see injustice. The error is to think that injustice is abnormal. It may be more realistic to act on the assumption that justice is a surprising anomaly. The reason to adopt this bleak premise would not be that we wish to assume the aura of ascetic realism, but rather that it does more service to mankind. It enables us to see the task; that the task is not to wag a disapproving finger whenever we come across an instance of injustice, as though it would be sufficient to do so, to nudge an ostensible system of justice to correct, or at least, condemn its own exceptions. The monster – the monsters we are facing are entire systems deeply entrenched which are simply not delivering and stand in the way of the most ardently desired objectives of human society.

So, I agree with the economist, Raguran Rajan suggestion: assume anarchy. This is what he wrote in the journal, *Finance and Development*:

Institution building is one area where international financial institutions and policy makers have learned from experience and have used common sense to devise practical approaches without much guidance from academia. And there is hope,

supported by a growing body of research, that more students of development are realizing that a better starting point for analysis than a world with only minor blemishes, may be a world where nothing is enforceable, property and individual rights are totally insecure and the enforcement apparatus for every contract must be derived from first principles. – As in the world that Hobbs so vividly depicted.’

The second observation might be that what we need is not legal analysis leading to evermore perfectly fraudulent texts, but to an understanding of reality. Forget about law journals and internet exchanges producing theories about theories! What we need to understand is more likely to belong to the craft of sociology, or simply to that of old fashioned responsible journalism. Now, fortunes have been made – I don’t know about that. Fortunes have certainly been spent studying issues of governance throughout the world, naturally including legal systems. Whether governance has improved as result is debatable. But it is a fact that these programs, governance programs around the world, if one is willing to get out of the law library and away from sterile debates on the floor of the U.N. – a vast body of very detailed reports on the state of judiciary systems – the alleged delivery – of justice around the world. These reports are readily available from international organizations, national development organizations or private foundations. Over the past few years, I’ve collected a great number of such reports. You just have to down load thousands, and thousands of pages, written by highly qualified development specialists. They are uniformly depressing.

To get the flavor, consider the titles of two recent World Bank studies. First, we find *The Inequality of Influence*, which introduces the concept of *crony bias*; associated with the subversion of institutions, tax avoidance, corruption – and for those who are not in on the game – the inclination at all costs to stay away from courts. Second, there is the admirably blunt title of *Misrule of Law*. And so it goes around the world, whether in Eastern Europe, the former

Yugoslavia, Ethiopia, Sri Lanka, Bangladesh, the reports uniformly conclude that ordinary citizens expect little from the courts and that, indeed, they are right, due to the long delays, political influence in the courts, ignorant judges, corruption, hostility towards women and the poor, expensiveness, and lack of transparency.

The uniform desolation is occasionally interrupted by reports of even greater dysfunctionality. In Ecuador, on the 20th of April, 2005 the then President Gutierrez, you may remember, was removed by a vote of congress and then fled and sought asylum in Brazil. This remarkable event followed an even more astonishing development four months earlier, in December 2004, when almost all of the Supreme Court judges were dismissed by a congressional resolution, and by a majority decision the Congress appointed 31 new members. This arrogation of power flouted a referendum in 1997 by which the electorate had expressly removed the authority of the Congress to appoint and dismissed members of the Supreme Court. The Special Rapporteur of the U.N. Commission of Human Rights observed, perhaps with diplomatic understatement, that and I quote the ‘people of Ecuador have paid dearly for this level of politicization which has contaminated their courts.’

I won’t even name some countries in Africa and Asia where allegedly powerful commissions were established with grand fanfare to eradicate admittedly endemic judicial corruption; where a few years later the attentive observer could note that not only had there been no convictions but not even a single prosecution. But rather than continue with a dreary endless roll call of the smaller countries, let us rather consider snapshots of three huge countries – and I promise snapshots, where much of the world’s population lives, Russia, China and India. Just some glimpses.

European Court of Human Rights – Russia has lost almost 400 judgments since 2002, and won 10, that’s hardly great news in and of itself. More than 45,000 petitioners came before the

Court in 2005 over 10,000 Russians, and the vast majority will never be heard due to the Court's limited resources. One can only imagine what lies beneath the tip of this iceberg. Some of you may remember one of these cases, the Salvation Army hounded through the courts of Russia for years. Every court, accepting the most astonishing arguments by prosecutors that this Christian charity group, whose members wear uniforms and whose leader is called a general must constitute and imminent danger to the state of armed overthrow and, therefore, hounded by the Russian courts. They actually won a case in the European Court of Human Justice.

More alarmingly were public accusations in January this year that Russian officials have sought to poison the President of the European Court of Human Rights, who said that he had been in Russia with a Swiss colleague, with Russian officials, and came within minutes of dying due to poisoning which he thought was orchestrated by his hosts. This was what the President himself said, that is Luzius Wildhaber, one of the most distinguished jurists in Europe so quoted in *Neue Zürcher Zeitung* in his own country of Switzerland. Perhaps more alarming, he explained why he had these suspicions. It's because he recalled what he called, I quote his words, 'a vile form of blackmail in 2002 when a Russian ambassador turned up in his office, asked for an appointment and had a very alarming message. He said, 'that unless 13 Chechans challenging extradition from Georgia were sent to Russia, Russia would publically blame the European Court for the Moscow theater siege when Chechen extremists took 850 people hostage.'

Well, China, you have heard today, this morning from Mr. Shoo, and this afternoon from the vantage point of an investor, and I will say nothing more than even presidents of distinguished arbitration institutions end up in trouble in Russia. This is the case of Mr. Wang Shengchang, whom we know well, President of CIETAC. As for India, I'll turn to this as an

illustration of injustice as a mere byproduct of lack of resources, statistics. The excruciating laboriousness of the Indian legal system is not a myth. The Ministry of Law told the Indian Parliament in July 2004, that there were – Argentineans can be happy – 650,000 cases which have only the ones who are pending for more than ten years, only before the jurisdiction of the High Courts. The longevity of the 23 million cases on the dockets of other courts is probably anyone's guess. The Chief Justice of India, doubtless hoping to stimulate some budgetary assistance, pertinently observed that the country has only 10.5 judges per million citizens, the corresponding figure for the U.S. being 107. One might wonder how many local judges are paid a prompt living wage, lest they be desperate to supplement their earnings.

Ladies and gentlemen, you may well be wondering if I am throwing stones from a glass house, and that is, indeed, so. Having lived in France for three decades, I can say that it is no source of pride in Paris, that although France views itself as being the birth place of modern human rights, it has the next highest rate of adverse judgments from the European Court of Human Rights, on account of judicial delay. Mr. Attorney General, you didn't name names; you just underlined the problem. According to a study conducted by the French for Research on Public Administration, it may now take 15 years to decide disputes as to the quality of workmanship in home buildings; 18 years to conclude the judicial winding up of small businesses, for example, restaurants; ten years to establish the pension rights of an incapacitated workman. But as I said, France is only second worse. In Italy the slothfulness of court proceedings might be a theme for comic opera, if the subject weren't so serious.

Before the year 2000, the old European Commission of Human Rights condemned Italian denials of justice in over 1400 reports and the European Court of Human Rights handed down 65 judgments against Italy alone. In the single year 2000, Italy was condemned in more judgments than all the contracting states combined. And there was a touch of partiality in

many of these delays. People who practice in Europe know all about the Italian Torpedo. The Italian Torpedo involves a contract where parties have agreed that any dispute will be resolved in a particular forum; it might be a court in country X or it might be arbitration. The Italian Torpedo involves the party that is the defendant in a dispute and doesn't want the dispute to get anywhere. Against the *forum clause* in the contract that party will start an action in Italy, that's the Italian forum, torpedo.

Now, ultimately, the action is for the purposes of saying that this forum clause is invalid. You have a right to say that the forum clause is invalid. Now let's say that this is a case of **inaudible** validity of the forum clause. It still takes 10 years to find out, ultimately, after appeal that the Italian courts aren't competent to decide on this particular issue, or that they decided inevitably in favor of the forum clause, at which point you can start your case but buy then it has become academic.

Given this bleak picture, it would be preposterous, I say – I hope you don't think it's too provocative. It would be preposterous to imagine that even half of the world's population lives in countries that provide decent justice. Whatever the technological innovations of the human race, whatever the astonishing comforts of its riches strata, this is surely a damning indictment: how can it be said that we live in a civilized world?

So, what are we to do? Is there room for optimism? I think the answer is affirmative, as long as we expose the fraudulent consensus. Our concept of decent justice is not to be compromised by meritorious concessions to cultural relativism. Such concessions do no more than to make us complicit with dictators, fanatics, and thugs. The rule of law is pure illusion for most of our travellers on this planet and things will not get better, unless we stop tinkering with texts and start dealing with contexts. Now, dealing with reality, I fear, is an insurmountable task if we set out with the idea of establishing effective justice

comprehensively. The least we can hope for – and it's not my friends, as the international law scholar Julius Stone put it in the 1950's, are *enclaves of justice*. But whereas for Stone that phrase was the lament of an almost inexpressible pessimism. I believe we can turn it around and ask ourselves whether we cannot consciously create enclaves of justice and hope that in so doing we prime a million pumps.

This is, it seems to me, fertile ground for a multitude of realistic projects. And I expect and sincerely hope that it includes a multitude, a universe of ideas beyond my own present imagination. Many enclaves of justice are doubtless possible within the framework of existing institutions, whether national or international. On the national level, for example, one might look to Singapore, which I remind you have lifted itself from poverty in half a century. To understand how a society might enhance the status, recruitment, and incorruptibility of judiciary in far too many poor countries the pentacle of the legal profession, as perceived by society, is the influential lawyer who can fix everything from the backseat of his limousine, while magistrates are nobodies, and paid like nobodies.

The Singapore answer was simply to recruit judges on the basis of merit and pay them good salaries, as befits the importance of the role they were intended to pay. Overtime it seems this has had a beneficial affect. Singaporean judges shave status, they have material security and they do not have their hand out. Or yesterday, last evening, we heard about an initiative in Mongolia. It may not have sounded like very much to some of you, an information system whereby it will be possible to find out what is on the docket of the courts in Mongolia. That is not a small thing. That would be a great thing to achieve. You try to find out if you are a litigant before the leading court of Indonesia, the Court of First Instance in Jakarta, impossible to find out what happened with the petition you filed. You might find out that a judgment has been rendered because the court decided that no hearing was necessary and you've lost the

case, and your assets in Sumatra have, in fact, been confiscated in reliance on that judgment where you weren't even heard.

Where are the rules you can look for to determine how the court decided that no hearing was necessary and an oral hearing suffices and so forth. There is no such thing; invented as you go along. It would be a good thing to have a docket which is available and transparent. Or to take as an example on an international level, the fact is that Russia does pay attention to the European Court of Human Rights. It's unquestionable. The Russian government, for one thing, has a perfectly good record of paying the damages awarded, although they may be quite modest by American standards. It is consistently and reliably reported that Russian officials are wary of exposing themselves to the ECHR's censure.

The very vehemence of Russian fulminations about ECHR judgments tell us that in some way the court is achieving some measure of justice which in time may achieve what academics call *compliance pull*. Then if we look at informal structures, a salient example is arbitration. You might remember that in the wake of the American Revolution when neither loyalists to the Crown, having been dispossessed in America (where they were viewed as traitors to be tarred and feathered), nor American revolutionists seeking to assert property rights in England. Neither group had much faith in the enemy courts. So, arbitration was instituted under the Jay Treaties, if you want to remind yourself what they were look in Chapter 8 in the red book, which most of have received in arriving here. This ancient mechanism is prevalent today. One manifestation of it, namely arbitration pursuant to bilateral treaties for the protection of foreign investment, has engendered much recent debate where I find that many legal academics miss the point.

For one thing, writers – if you don't mind my saying so – writers in search of an audience excitedly point to an esoteric inconsistencies, in the reasoning of such tribunals as evidence of

the legitimacy crises in international arbitration. Given the horrific failings of much of what passes for a judiciary around the world, such complaints strike me as worse than trivial; like telling passengers in the freezing water that they should not enter the lifeboats because the seats have not been equipped by regulation push-ups.

Finally, I would suggest that wholly informal enclaves of justice may emerge as concomitants to globalization, irrespective of national law, irrespective of international treaties. Today, a Mexican football team, which has paid a signing bonus of one million dollars to a player who took the money and went to Brazil before concluding his contract does not necessarily have to worry about the courts of Brazil or even finding the assets of the player. Because there are borderless rules for sports played on the international level which have the import that the Brazilian team, which has now engaged the player, must accept joint liability for the player's debt, as established under hierarchical order of national federations subsumed under an international federation or else face exclusion from major league competition in its home country. If that sanction is not acted on by the national federation the entire Brazilian Federation would face exclusion, as Brazil, from international competition. Needless to say, compliance is instant. Now, this looks like law, contracts, statutes, lawyers in courtrooms, tribunals applying norms in reasoned judgments after having heard evidence in argument, but it is neither national nor international law. There are no public authorities in sight, and yet this is law in action.

We've heard some quotations from some heads of states here. I'll end with a quotation from one of them. A famous head of state once said this to leaders of his nation, I quote, 'You have yourselves formed this very state, to a large extent through political and quasi political structures under your control, so perhaps what you should do least of all is blame the mirror.' That was said in the year 2000. The state was Russia, ladies and gentlemen, and the Head of

State was Vladimir Putin; his is audience, a gathering of querulous Russian business executives. Isn't the world our mirror? (Applause)

MR. BARRY APPLETON: That's a difficult speech to be able to follow-up on. They tell me, when I get a chance to go on TV, never follow-up with kids or small animals but, in fact, Jan has given a tremendous presentation. But I am going to try to be his yin to his yang. I'm going to try and suggest to you that there is an optimistic rather than a pessimistic view. I now understand why I was invited to be able to give a little presentation today and I hope that I am able to – I won't be as elegant as Jan, I never am, but I hope to be able to get a few points in along the way.

Today, what I really would like to focus on, are some recent unique factors that have resulted in an emerging multi-cultural consensus about the nature of the rule of law and a very particular in a limited area of international congress. This may, in fact, be one of the enclaves of justice that Jan may have been referring to, and maybe we are closer than we might be; but it may not be. So, we'll leave it to the end. We'll see if we can duke it out this evening. My central premise is that there has been a unique intersection of three new forces, and that these forces have resulted in a new rule of law over specific types of aspects of international investment, and that this has all be powered through the institution of arbitration.

These particular forces are the following: globalization, the existence of an exceptionally pervasive global network of international investment treaties, and third the use of compulsory international arbitration to resolve these treaty-based international investment disputes. Taken apart individually these developments seem rather inert, but when they are combined together they have created a chain reaction, and this has resulted in a powerful new approach to the rule of law that at the same time has been highly sensitive to multi-cultural concerns, because they always are dealing with disputes or controversies between nationals of one country and

governments of another. So, I hope to be able to briefly examine the rule of law, to look at the impact of these recent developments and then to provide some general ideas about the stability of this new rule of law, or perhaps we can determine ourselves whether we think it is an enclave of justice, or whether it is just part of that highly suspicious unfair consensus that Jan Paulsson was talking about. I leave it to you to be able to decide.

Let's just look very carefully and briefly at the rule of law, because you have heard a great deal about the rule of law through this conferences. But I think it is very important what we mean exactly by the rule of law. Of course, this refers to a concept where society is bounded by law. This is not a self-serving law. This is not the situation where you have a regime change and then the government says, 'well, we are now the government and this is the law.' In fact, in China they have a concept between the law that's expressed by rulers and the natural law. The natural law is a proper law; it doesn't shift between new administrations, but the administrative law that may create the 'lee' rather than the 'fa,' the new law that may not be right and you really don't have to follow that, but you have to follow the natural law. This is a concept that goes back more than five thousand years.

But the core concept of rule of law has an understanding that society needs to be ordered around a set of laws that apply similarly to all, on the basic principles deducible from the rules and not dependent on the identity of rulers. So, the expectation that rules of law will apply to all and that, in fact, will be read similarly, and applied similarly to all. That's what seems to be a universal rule that identifies similar application. That's the fundamental concept of the rule of law. So, it makes no difference if you're rich or you're poor, it makes no difference if you're born high or low, it makes no difference about your religion, your ethnicity, you're different political parties, different skin colors, different families. None of that makes a difference with the concept of the rule of law.

I read an excellent paper from Professor **Wong cast probably(?)** Boston University School of Law, who suggested there are four essential elements of the rule of law and they are:

1. Rule fidelity that is of the appliers of the law are engaged in actually applying the law;
2. That there is predictable and principled – I can see where they probably spelled principled — predictability;
3. That’s foreseeability in the rules that are going to be applied;
4. That there is rule validity, that the derivation of these rules come from some valid legal source and that there is external authority. That is, that the rules are set and that the acceptor is someone other than the person who has made the rule.

And these four elements are fundamentally the foundations of the concept of the rule of law. I’m going to suggest to you that these three recent forces: globalization, the plethora of international investment treaties, and the advent compulsory national arbitration, meet the tests to be able to establish the rule of law. The answer to each one briefly:

Globalization: We all know about globalization but often we really don’t know what globalization is. If we look at the issue of international investment the results are absolutely startling. From 1980 to now there has been a profound increase in global investment flows. Now, the Global Policy Forum reported that there was a 10-fold increase over the last 20 years in foreign direct investments from developed countries to developing. Let me give you some numbers, because in 1970 for developed countries, you’re looking at inflows of \$10 billion dollars in total. By 1999 this had increased to \$208 billion dollars, and this trend is continuing. From 2004 to 2006, global foreign direct investments increased from \$710 billion dollars, to \$1.23 trillion. This is a ubiquitous existence, a backdrop of foreign investment that underpins the other two forces in a very significant way.

International Investment Treaties: This is a critical factor because there has been an unprecedented massive adoption of these international investment treaties. Now, the first international investment treaty. Now, the first international investment treaty started in 1959. The early treaties, there were a few of them; no one really paid very much attention to them. But, in fact, to date there are now some 2500 of these international investment treaties. You might know them by other names, for example, NAFTA is one of these types of agreement, so is the Asiean Agreement, so is the European Energy Charter. But at their hearts are the agreements, all have key concepts about what you can expect in that country. There are three key concepts that you see in every single agreement:

- 1) Protection against uncompensated takings by foreign governments.
- 2) Protection from unfair, arbitrary, or discriminatory treatments of foreigners from that government.
- 3) Guarantees that governments will respect their contractual and other obligations.

Now, these are all covered in these treaties. By the way the United States, this is one example, has more than 50 of these treaties. There are a huge number of Hezbollah treaties that created a framework around the world. Perhaps they might make the test of enclave justice – I could even go broader than that. They are limited to a very particular area. They will help you with general human rights issues. They can help you in the area particularly about international investment. But we're coupled with this massive increase in global investment. The network of investment treaties has created a new process to establish and protects the rule of law, but this couldn't happen without the power of arbitration.

So the final piece of this process is the power of arbitration, because each of these treaties has a compulsory international arbitration clause, and this provides a forced conversive mechanism to deal with the set of legitimate expectations that we see created from these

treaties against the backdrop of massive amounts of international investment. So, like the old systems that we have there is a jurisprudence that started and created from these arbitration tribunals, and inflicts the premise of it. The fact of the matter is, this jurisprudence in itself helped create legitimate expectations. I'm going to actually agree with Jan, this tremendous consistency actually is where these tribunals tend to go. **Inaudible** the law of differences, **inaudible**, very much to give us the same type ideas. But with the treaties on one side and with the purpose of this jurisprudence on the other hand, we see a strong set of identical, predictable, legitimate expectations that foreign investors have when they start to invest abroad. And so these arbitrators have created a given set of treaties rules, so that all of them – they have a jurisprudence that's based on predictability and legitimate expectations. The rulings come from a system of law and they, outside of these local governments, are able to provide an external review for this governmental danger. As a result, they are in a position to be able to deal with the fundamental underpinnings of the rule of law.

So, the last piece, though, is this, what makes these arbitration provisions unique and special, is that they have been able to accommodate cultural diversity. Because in each of these cases you tend to have disputes brought by people who come from different legal regimes, different national regimes, and these arbitrators have to reconcile fundamentally that arbitration is based on – fundamentally the concept **inaudible**. **Inaudible** is the sacrosanct principle of arbitration and, therefore, arbitrators have to be very focused on the need to be able to deal with this. So, when we look actually at what has taken place, we see that the need to accommodate cultural diversity has been very important.

So, for example, you will see an important decision dealing with jurisdiction, where an international tribunal had to take into account an Egyptian notion that nationality goes for a hundred generations back. The claimant was warning the United States that it had no

connection to Egypt or their parents, or that their parents were Egyptian. So, the tribunal said, while we don't really like this idea we feel we have to take into account the cultural aspect and, therefore, they sided with Egypt in that case. Or taking into account surreal law – Surreal law says you can't have interests, and in an annulment city that sort of the ultimate quasi **inaudible** of one of the institution's. The appellate, the annulment body, took into account surreal law, as to whether or not interest should or should not be payable to a successful claimant against Egyptian states.

This was in addition to the types of issues that we generally find when we look at the usual tussle, which is between common law and **inaudible** law, whether it should be **inaudible**. I know that in America it's certainly **inaudible** than a Canadian. There is a big difference in how we even document **inaudible** and I was trained in the U.K. Another difference again, that's a common difference. The more uncommon the difference the more capable international arbitration has been to be able to reconcile. So, every time I look up a bill in the United States it says 'e pluribus Unum.' **Inaudible**. That's sort of a model **inaudible** laws in the United States. In many ways this could be the model for this rule of law, because out of many differing legal cultures there is one particular area we have actually been able to meet the requirements for filing of rule of law, and we have been able to find a hybrid **inaudible** concept to be able to accommodate the needs of this type of procedure.

Because of globalization, which has created a framework to be able to underscore this, because of the existence of these multitude of agreements and the ability of arbitration to have a **inaudible**, but yet be flexible in how you address these issues. We have been able to find a unique new system, in a very particular area, which I would suggest to you, is in fact, the basis of the rule of law. Thank you very much. (Applause)

JUSTICE LEMONS: Thank you, Barry, an excellent segway into a very now discreet and focused discussion. Time will be shared by Richard Naimark and by Grant Ackerman on that subject. Richard, you're on.

Richard Naimark: Thank you, Bill, Dean Smolla, all of you. I realize time is late so I will be brief, not simply because of the hour, but also because I'd like you to hear the adjoining piece by Professor Ackerman. I am going to talk very briefly about, sort of take an experiential approach to cultural issues, in terms of transactions, relationships, dispute resolution. Then Professor Ackerman is going to put some nice structure on this and give us some concepts that make, I think, some of the experiences more accessible.

I would like to start first with a question. This is a bit of audience participation, although I am expecting no answers to be shouted out. (Laughter) The question is, in your heart of heart or with your best analytical thinking, do you believe that people, all people, regardless of cultures or where they are from, are basically alike underneath, or do you believe that people of different cultures are basically different? There was some research done on cognition. Cognition is essentially the manner in which people organize their awareness. In this particular experiment, it was a lovely little experiment; they took a group of people from Japan and a group of people from the United States.

What they did was they flashed some pictures in front of them for a brief duration and then took them away. Then they asked each of the respondents to describe what they had seen. One of the pictures they used was an aquatic scene. It involved a large fish in the front, some smaller fish around, there were some plants, there was sand, there were rocks, there were bubbles, perhaps. In the descriptions, afterwards, each group was asked to recall details from the picture. The Americans, interestingly, were most likely to describe the big fish in the front and they would say things like it looks like a trout., perhaps one or two of the fish that were in

the scene, especially if they were in the foreground. The Asians were much more likely to describe the setting; the water was green, the bottom was rocky, they would say. And they were much more likely to describe the relationship between animate and inanimate objects.

What the experimenters then did was very quickly flash another picture; this particular picture happened to be a large fish in the foreground but the setting was a subway system, the underground flashed very quickly. Then they asked each of the respondents to describe what they had seen. I will read you brief quote from the write up of the study which said,

‘Most importantly the greater attention paid by East Asians to the context and relation was more than just superficial. Shown the same fish, larger fish swimming against a different novel background, the subway system, Japanese participants had difficulty recognizing what it was, whereas all the Americans said, oh, it’s a fish.’

Quite simply, those raised in the Japanese culture, and I would suggest most Asian cultures, have a tendency to see things more holistically and inextricably bound with their context. Context itself has meaning. Americans and British I might add, tend to extract essential elements away from their context. That’s how we intellectually deal with them, and partly we do it because we do it to avoid contradictions. Japanese and most Asians can accept a good deal of contradiction as the existing state of affairs. This makes most of us from the American culture quite uncomfortable because contradictions are to be resolved. Americans and British tend to extract essential elements away from their context to resolve ambiguity.

The point is, as illustrated by this study, all people are not the same, they do not think the same, they don’t make the same observations, they don’t see the same relevancies, they don’t have identical thoughts. They arrive at different conclusions by different mental

processes; they don't organize their thinking in the same ways. By the way Asian cultures are generally considered to be more high-context cultures, obviously because of the importance of context to them; whereas, the U.S. culture or British culture, tends to be more low-context. By comparison, the Mexican culture would be somewhere in between. I'm reminded of a lovely quote from Andrea Gene, the French author, which challenges our perceptions and he said 'Fish die belly upward and float to the surface. This is their way of falling.' (Laughter)

Let's take a look at that major western export, that pillar of western legal and business conduct, the contract. When is a contract not a contract? For those from high-context cultures, a contract can represent something different, sometimes very different, than it does to those in the U.S., for instance. In the U.S. the contract is to a large extent, the law. It is the relationship. It describes the obligations and responsibilities of all the parties to the contract. To some people from higher-context cultures, the contract is somewhat more symbolic, more thematic. It is a representation of the partnership, the rapport, the commitment of the parties at the time of contract formation; but life changes, situations change and if parties have a real commitment to each other, as exemplified by the contract, they'll adapt the agreement to fit the changing context faced by one or both of the partners.

Now, faced with new demands for new terms in the middle of the life of an agreement, U.S. lawyers and business people are inclined to think that their counterparts from high-context cultures are shifty and unreliable. After all, the terms of the signed contract are in black and white. The contract is unchangeable law. On the other hand many Asians who I have talked to, for instance, are inclined to think that Americans are poor and unreliable partners, a little bit simple minded in their thinking. Clearly, if the circumstances have changed so must the contract.

Some years ago when I was a bit younger, I was asked to serve as a mediator in a dispute between a Korean shipping company and an American computer services firm. The shipping company had bought up a smaller Korean company which had the contract with the American firm. The Koreans wanted to renegotiate the contract. The Americans did not. The mediation was a failure. The Koreans showed up with a group of about 10 negotiators and their American counsel. They spoke some English. Some spoke English, some did not. Some of them, by the way, spoke English but hid that from me for over a day. (Laughter) The Americans were represented by two, the owner and his lawyer. The owner was a very bright, very successful hard driving young man, and his lawyer was a hard-nosed litigator of the old school, who introduced to me by saying, 'I don't mediate, I litigate.' The Americans were very angry and impatient and clearly felt violated. The Koreans were very patient and calm and clearly ready to spend many days to work out a new relationship.

I had to keep them in separate rooms because the tension was unbearable. The Koreans could not phantom the red-in-the-face, table-pounding of the indignant American. And the Americans could not understand the seemingly slipperiness and indirectness of the Koreans. By the end of the first afternoon the mediation was pretty much finished and there was no resolution to come. But I didn't know better. I wasn't a very good internationalist. If I knew then what I know now, I would have started the meeting with the Koreans days before calling the Americans in. I would have explained contracts to each other in each others' cultural context. I would have done the negotiation dance with the Koreans and had a heart to heart talk with the Americans. Instead I tried to mash the two together and it did not work.

Now, don't get me wrong in the implication of what I am saying. Clearly, rule of law is important, even a critical concept, and as we have heard today it may be the best hope for human rights around world. But we have also heard that many situations, law, itself, as

much as we dislike saying it, can be ambiguous. So, what is the rule of law really? I believe it is a faith, I suppose, in fairness and justice above all – a sort of higher moral principle that does seem to be universal. We did a study a few years ago; I'll give it to you very briefly. It was a survey, the beliefs of attorneys in business who participated in international business arbitrations, both before and after. We asked them just a forced rank, in order of importance, various attributes of the arbitration process, including money, saving money, saving time, finality, fair and just results, privacy, expertise of the arbitrators, and the ability to preserve working relationships.

Fair and just results was ranked the most important attribute by the vast majority. It was ranked more than twice as important as any other attribute including winning money. Now, you can be as cynical as you want too, but I think what I would call that is a marker for the rule of law. There seems to be an almost perceptible yearning, hunger, regardless of where the people are from you deal with for this concept of a higher sense of fairness and justice. I want to note that in my observation, law and external legal systems tend to be strongest in societies with weaker social bonds, low-context. Higher-context cultures tend to perceive less need for external law, because their culture has more constrained rules of behavior. Laws, essentially in an external and objective context is more internalized, diffused and subjective. So, it is no accident that the U.S. has so many active lawyers and Japan has so few.

So, I would submit that this all provides us hints for what it means to be an internationalist and a purveyor of the rule of law. And that, however indirectly we got there is where you fit in. You are pathfinders, the interpreters, the determiners of meaning in this new chain of interactions. We are counting on you to meet with people of other cultures and ideas, and reach and understanding. It could be over the formation of a relationship, a contract, a resolution of a dispute, and it is a difficult task. There are pitfalls aplenty. You may feel

tempted to apply the legal training and law of your country of origin, no matter how irrelevant. You may feel inclined to feel open and trusting of your new acquaintances because, after all people are essentially the same, aren't they? You may be dealing with law with words in comfortable business practices, but to be successful you must be in a state of understanding of people, who they are, what makes them tick, how they see things.

So, somehow, in this maelstrom of dislocation and money flow, relation building and tearing down, new treaties and old treaties, legal corruption and legal integrity, you have to be the pathfinders and the answer makers. Yours is an enhancing role. You have to negotiate your way through different mindsets and ideas, competing interests, agreeing interests, social systems, administrative systems, legal systems, and bring us all a measure of what the parties to international arbitration have told us they want most, fairness and justice. We can be cynical about this and think of it as just a power game and a quest for money, and yes, it is those things, too. But it is truly about an evolving world community and as fitful and as difficult as that may be to forge, you, my friends, are the ones who will make that happen. Thank you.

(Applause)

Professor Grant Ackerman: I'm going to continue with remarks that Richard has started and focus specifically on this idea of cultural world views and perception of fairness. I want to begin with that latter concept and suggest to you that all of us would agree, as the study that Richard quoted suggests, that fairness is fundamental to any rule of law. That is applicable to international public policy issues. It's applicable to commercial laws. Just last week when the Iranian government finally released the British sailors there was one commentator in the international relations area who suggested that the Iranian government had taken an approach that was rational, that was reasonable. He said that based upon a standard of fairness that he had studied, that the world has adopted, and that he also had internalized.

In the commercial area, when you think of performance of the parties, the consistent word that's used is *reasonableness*. Finally, in terms of tort law, we talk about a reasonable person. In fact, it was English jurisprudence that gave us the concept of a reasonable man of ordinary prudence. So, now the question is what happens when different views of reasonableness occur? In other words, what happens when people look at the same set of facts and they have a different conclusion about what is reasonable? That's where I'd like to explore and get to a deeper level to talk about. What happens when our world views, our cultural conditioning, ultimately influences our perception of fairness and the conflict that occurs then as a result of that?

To give you an example of arbitration that was the U.S./Iranian Claims Tribunal. It was established after the U.S./Iranian hostage crises sometime ago.

International Dispute Resolution and Cultural Differences**Continuation - Professor Grant Ackerman**

... Come the revolution the medical complex was never built. The Iranian lawyers, representing now the revolutionary government of Iran, argued before the tribunal that the Shah and his sister should not have been able to enter into multi-million dollar contracts for services that would benefit themselves personally, while at the same time the general population suffered. In essence they argued that the contract was illegal because it violated public policy. They didn't use that argue, that's my interpretation of what they presented to the tribunal. To find in their favor, at least under Western law, the arbitrators would have to conclude that the contract was inconsistent with more or less well defined standards of conduct which were generally accepted by the community as a whole. That, of course, begs the question: To which community should the arbitrators look to find the more or less well defined standards of conduct. Given these set of facts, if you were asked to determine whether the contract was illegal or legal, how would you decide and why?

I would suggest to you that reasonableness or fairness, as much as we use those terms, as near and dear as they are to our systems of law, ultimately is in the eye of the beholder and it is a product of cultural conditioning. Cultural conditioning is driven by long standing and commonly held values that define the very identity of a people. Now, perceptions that rules of reasonable are converging, may simply be a product of one culture, at times, not so willingly adopting the values of the world views of another culture. I would suggest more specifically in the West, if we herald the expansion of the rule of law, are we expecting others to change their view of what is reasonable to fit within an existing paradigm, our own.

So, if international conflicts have at their core fundamental differences about what is reasonable, how should these differences be resolved? It is only part of the answer to suggest that we point to the rule of law in a process by which the parties turn to some method of dispute resolution, other than self help, or abject power – unless we carefully consider perceptions of reasonableness and how they might collide. One party may be saddled with the burden of accommodation, that is, they'll be required to adhere to and abide by the other parties culturally derived standards of reasonableness or fairness. In the U.S./Iranian Claims Tribunal case, though it was considered a neutral tribunal two of the three arbitrators came from Western countries. How the arbitrators viewed the case was defined not only by the applicable to the case, but also their cultural conditioning. The Iranians ultimately had to accommodate what this tribunal decided was reasonable, even though cultural determinants of reasonableness were embedded in the process from the outset.

The rule of law is never in and of itself culturally neutral. Each of us views the world through a cultural lens, which can influence whether what we see is foreign or familiar, reasonable or irrational. And one of the greatest challenges that you may ever encounter is that persons understand and then enforce a standard of reasonableness that does not necessarily align with your perceptions of what is fair. Now, what I would like us to do in the short amount of time that we have left is to explore briefly a practical application of this, in terms of what the heart of cultural world view means and how it impacts a dispute resolution process. And to do that, I want to work with the concept of individualism and collectivism. Richard mentioned high-context, low- context; it was a great illustration of differences in culture. I'll suggest individualism and collectivism really go to the heart of some of the conflicts that appear in international scenes now; both in public settings as well as in private transactions.

So, to get us started, let me explain briefly what individualism and collectivism is, and then I have some questions for you, also. In an individualistic culture a person's self identity where the way he or she thinks about himself or herself, is limited really to his or her own person and perhaps their immediate family. Who they are, who they protect, who they work for the benefit for, is really limited to themselves. In a more collectivist culture the sense of identity extends to a wider social circle. The person's sense of existence, security and obligation, is very much intertwined with the larger group. Studies show that the United States and Great Britain are more individualist cultures. That should not come as a surprise to any of us, as we think of our values and commitment to individual rights and responsibilities. There is a challenge because we may not be able to understand the world view of a collectivist culture. So let me ask this question to help us better understand this idea.

All of us, at one point in time, I believe, have had to work in some kind of group; a group project, a group dynamic in order to accomplish a goal. Certainly this conference is an example for the law students here getting your outlines done, as a group effort, typically. How many of you – and I am going to ask for a raise of hands, here – how many of you have been involved in a group where you had to work just a little bit harder in order to get the job done because somebody else in the group, perhaps, wasn't working as hard as they should have? How many have had that experience? (Laughter) Okay. Now, for those of you who didn't raise your hand, they're talking about you. (Laughter) But let's explore this idea called *social loafing*. Social loafing has been documented in the social psychology journals, in experiments and real life examples. Social loafing is basically that idea where an individual does not contribute fully to the group, because they have a sense the work will get done by somebody else.

There is great research done that compare social loafing, the concept of social loafing, across cultures. In a group productivity experiment conducted with Chinese and U.S. managers, results showed that Chinese participants actually worked harder when they knew that they would be rewarded as a group. Stated another way, when they were working for the benefit of themselves as an individual, they were not as productive as when they thought they were contributing to the overall success as a group. The U.S. managers had just the opposite reaction. When they thought they would be rewarded as a group, they were not as productive as when they thought they were being rewarded as an individual.

Now, how might this fundamental difference in motivation, in world view, about who you work hard for, affects a dispute resolution process, affect an international agreement? Let's think about it a distributorship contract. Let's think about a joint venture agreement. In the Western individualistic world view, the agreement is designed to be an arms-length transaction, and it allocates the risks between the parties. In other cultures, and includes Asia and Latin America, a contract, just as Richard has suggested, is something different. It is viewed as an agreement that binds the parties together, and in that world view each should work for the benefit of the other. Thus, a change in circumstance should lead to a shift in the burden or perhaps a change in the contract.

I did have the opportunity to talk at length with Andy Prozes about the challenges of Lexus and Lexus in China, but we did speak about the case briefly. It is with too limited facts. I am not appropriate to draw any conclusions. But that challenged of what occurs in a contract may relate, in part, to the idea of perceptions of how that contract unfolded and what's appropriate in terms of that over all relationship. Just so you know; Andy had to leave. We talked before he left. He knew that he would not be here to hear my remarks. I promised him that when we

returned to New York, I was going to give him a dramatic reading of these remarks in his office. (Laughter) So, he'll have the opportunity to comment at that time.

Now, let's think about this for a moment, that idea of changing the contract in order to benefit the other side when, in fact, we are used to an approach that suggests we have allocated the risk already, the contract remains. Some might suggest that a collectivist approach, if we can call it that, it's just not reasonable, it's fair. Well, I would suggest to you that's born simply of the fact that you have values, appropriate values that suggest that it's not fair. It does not necessarily mean, though, that other values and other perceptions of fairness are not valid. Some of you might simply say, 'Well, look, that's not the way we do business.' In fact, there is the development of treaties. The development of law, the rule of law around the world, and the rule is that a contract should allocate risks and that's appropriate; to which I say *so far*.

As suggested previously our systems of law have embedded in them cultural norms and values that may saddle one party with the burden of accommodation. Right now it's Western values that prevail, in an individualistic approach to rules as accommodated by other sides. In the course of the next 400 years, is it possible that the rule of law will evolve to a more Asian-centric approach, and bring with it perceptions of reasonableness that are very different than what we know? Very specifically, is it possible that international law can evolve to the point where the obligation of good faith implied in a contract, which is part of our Western system now, means that the parties have an affirmative obligation to protect the interests of the other. Thus, when external circumstances change, the terms of the contract should change. Would enforcing that rule of law be patently unfair? Or stated another way, if not enforcing the original terms of the contract would that be patently unfair or would it simply be based upon the world view of what a contract is or should be, based upon a different world view of relationships?

Now, let me emphasize that I am not advocating for culture relativism that suggests that there is no such thing as right or wrong. Each of us, as individuals and as societies, have rights. And we should conclude which values are worth holding and in so doing, create rules that align with those values. I am suggesting that to assume from the outset that one's currently held values, or world views, are synonymous with abject fairness is to actually circumvent a very helpful process of trying to understand how others view the world and what they perceive to be fair.

Before we talk about what might happen 400 years from now, let me move to a moment that's a little bit more practical, in terms of what we are to do now as we work with individuals who may have a different perception of what is fair. I'll call upon the U.N. Convention on contracts for the international sale of goods; though it applies only to merchants it can be instructive on this point. The creators of the convention worked long and hard to think about this idea of reasonableness, particularly, in terms of interpreting statements from the other side. CISG Article VIII (The UN's Convention on Contracts for the Sale of International Goods) reads in part as follows:

‘Statements made by, and other conduct of a party, are to be interpreted according to the understanding that a reasonable person of the same kind as the other party, would have had in the circumstances.’

In essence, under the CISG the communicating party has the burden of making sure that his or her statements or behaviors are understood by the other party, based upon the cultural conditioning of the other party.

In essence, under the CISG, reasonableness will be determined by the eye of the beholder. The challenge, of course, is trying to find standards of fairness, reasonableness that all can agree on; not just giving one side the burden of accommodating the others. In that effort to

find a convergence of common ground on standards of fairness let me share this story with you. When coming back from China – I was in China some years ago, and I learned first hand about the crises in the banking industry. In that crises, loans had been made to individuals based more on *grouchier* relationship, rather than necessarily an analysis of their credit worthiness. Of course, that lead to bad loans, unproductive loans, and a crises in the banking system. Now, some might suggest there's evidence of the challenge of doing business based upon relationship rather than an arms length transaction. Except that when I returned to campus, I saw a billboard, as I was driving to campus, a billboard for a local bank that was touting *relationship banking*. That bank, as well as other banks in the U.S., has resolved that you should be more than just a number on a credit score, financial statements, and it would be the personal relationship that would be a part of their decision making.

So the question is, which is reasonable: to have banking decisions made upon personal relationship, based on just subjective numbers, both, neither. That's exactly what we have to come terms with as we perceive different standards of fairness and come to that common ground. As Barry suggests, as globalization continues there is going to be those opportunities for misunderstanding and international arbitration, mediation, or those opportunities to forge the common grounds and understandings as an advocate or a mediator. You may be given the task of helping the parties understand that what they agreed to is not actually what they agreed to, based upon how others were perceiving statements or conduct. As an arbitrator you may be in the position of having to make a decision, give an award, based upon a standard of fairness that is not aligned with what your perception is. You would do that because your commitment is to do justice to the agreement of the parties.

Ultimately, though, as members of the international community our effort always should be towards finding that common ground of shared understandings, in the process create new rules

that will help us in international disputes. If we're able to do that, if we are able to find that common ground, create an environment where principles can trump power and the rule of law prevails, perhaps we'll have the opportunity for those who will come after us, to return here 400 years later, and talk about the rule of law. Thank you very much. (Applause)

BILL: Thank you very much for your kind attention at this late hour. I promised you we were going to cover the waterfront here and I think we did and I hope you enjoyed it just half as much as I did. We've been talking about these issues, largely in the commercial context, of course, but one never should underestimate how far the potential goes with respect to the kinds of attempts to reach concord may go. Numbers of you in this room will have read Tom Freedman's latest offering, *The World Is Flat*, and if so you may recall, in one place, he describes his McDonald's theory of concord. Essentially that no country that has a McDonald's franchise has ever attacked another country that has a McDonald's franchise. So, there may be greater implications for all this.

With respect to the discussion about the impact of culture on conflict management, you're part of a new wave. We've been thriving and with Professor Ackerman, been driving a discussion in this regard. The hard question is where do you take it and we're not put off by not having the answer to that question. It is rather we think an important issue that needs to be discussed openly. So, thank you for the way in which you have engaged that issue here today.

Would you join me in one more round of thanks? I think we are beyond our time so we will just take your questions individually, if that's okay. Thank you very much. (Applause)

DEAN SMOLLA: Thanks to the panelists. That was a terrific panel and I'll leave you with this story, a very brief one, which will lead us naturally to the reception. Of course, we were in the hometown of John Marshall and he was famous not only for being a wonderful jurist, but also a great enterertainer, a very convivial host, and he would have lavish parties at

the John Marshall house, which you can tour, a couple of miles from where we are. And he was famous for serving generous portions of libation during these parties and this would help lubricate the discussions. Now, it's also a fact that we are in the state of Thomas Jefferson, and he did not, of course, like John Marshall and he wanted to get a justice on the court who could stand up to him intellectually and not be seduced by his magnetism and his charisma. But try as he might no one that was appointed to the court could ever quite stand up to Marshall. They would be seduced by his personality and his intellect and they would become loyal Marshallians.

The best example is that of Joseph Story who was a wonderful intellect and who Jefferson had high hopes for. He appointed Story to the court and Story was now a newly appointed Justice and it was his first opportunity to hear cases. Now, back then, unlike now, back then Washington was a place of rumor, gossip and innuendo. (Laughter) The particular slander that had currency at the time was that the justices would often drink during oral argument, and then to proceed to continue drinking during the conference sessions in which they would decide the cases. Stung by this criticism, Marshall issued an edict as Chief Justice, that the liquor cabinet of the Supreme Court would be locked on conference days unless it rained.

So, it came that after the first set of arguments after this edict, Joseph Story was brought into the conference room of the Supreme Court of the United States for the first time, and John Marshall instructed Joseph Story, the youngest justice, to carry out the duty of going to the window, opening the sash to determine whether or not it was raining. Story goes to the window, opens it up, and not unlike the sight I see here right now, the sunshine was shining brightly. He comes back to the table and says, 'I regret to tell you, Chief Justice that I've looked outside and the sun is shining brightly.' John Marshall looked at Story and said, Justice Story, I'm deeply, deeply disappointed. You came to this court with a reputation for

your intellect and your knowledge of the United States Constitution. I have read the Constitution and it says that the jurisdiction of this court extends to all the states and territories. It must be raining somewhere. (Laughter) Open the liquor cabinet.

Thank you for your kind attention. Thanks again for the panelists and we will open the liquor cabinet outside. (Applause)

**Historic Jamestown, Interview with Justice O’Conner
& Plaque Ceremony**

Justice Sandra Day-O’Conner Interview

QUESTION: Justice O’Conner, you are the honorary chairperson of the Foundations and Future of Democracy Conference. The culminating World Forum will take place September 16 through 19 in Williamsburg, Virginia, where world leaders, many from emerging democracies will participate. What do you see as the legacy of the World Forum and the dialogues that will take place?

JUSTICE O’CONNER: Let me speak first about the legacy of historic Jamestown, whose 400th birthday we are celebrating this year. The chief legacy of Jamestown, which became the first permanent English settlement in the country, was the rule of law; because the settlers bought with them a charter that told them to be guided by the British legal system in effect. Four hundred years before Jamestown was the signing of the Magna Carta, which for the first time provided that all of us are subject to the rule of law, even the king, that we are all equal in that respect. That legacy was embodied then in the charter that was given to the Virginia Company that was sent here with settlers to try to make some money. Of course, they tried to grow tobacco and make money and pay back the people who gave them the charter.

The charter was drafted by members’ of the Middle Temple, lawyers in Great Britain in that day, and drafted it in 1606. They were lawyers in the Middle Temple who did this. We have quite a legacy at Jamestown for a legal framework and that’s the main contribution that I think the settlers made, from my perspective, because it was to build on the legacy of the rule of law that is what prevailed at the end of the day. It was kind of hard to come by in a way because the settlers in 1619 brought the first group of slaves to this country and it wasn’t such a

happy legacy. It took us 350 or so years to solve that problem when the Supreme Court of the United States finally decided Brown vs. Board of Education, and said that under our Constitution we are all equal regardless of race. So, it's been a long story, long time coming, but I think with a good ending, and certainly it all began in Jamestown.

INTERVIEWER: Thank you

Fife Band playing.

Presentation of Plaque Ceremony

English Inns of Court and American Inns of Court,

National Parks Service, Dean Smolla, Barry Kirkuk, Elizabeth Cottony.

Unable to transcribe presentation ceremony due to poor quality of Window Burn.