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**Georgetown University Law Center &
American Law Institute**

**"Fair and Independent Courts: A Conference on the State of
the Judiciary"**

Remarks By:

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**THE MANDARIN ORIENTAL HOTEL
1330 MARYLAND AVENUE, SW
WASHINGTON, D.C.**

CHIEF JUSTICE JOHN ROBERTS: Thank you very much. Thank you. Thank you very much. I appreciate it. I came into the reception and saw Ted Olson; I saw Walter Dellinger; I saw Kathleen Sullivan; all people who have won cases against me in the Supreme Court, and I thought, am I in the right place? (Laughter.) But thank you very much for that warm welcome and the generous introduction.

I want to begin by thanking my colleagues, Justice O'Connor and Justice Breyer, for chairing this conference. Monday was the 25th anniversary of Justice O'Connor taking her oath as a member of the Supreme Court on a very bright and sunny day back in 1981. And I was very fortunate a year ago that Justice O'Connor extended her stay on the court so that she was quite literally by my side on the bench when I began my tenure. For the past fifteen years or so, she has been extremely prominent in promoting fair and independent judiciaries around the world, particularly in Central and Eastern Europe. And it's natural that she would take up the cause here at home as well.

I also want to thank Justice Breyer, the co-chair. He also was very helpful when I was getting started a year ago. First week I was on the job, he came by my chambers with a copy of his book, *Act of Liberty*. (Laughter.) I thanked him for it, and I assured him that I would lose no time reading it. (Laughter.) I also want to thank the American Law Institute and the Georgetown University Law Center for sponsoring this important conference and the Annenberg Foundation for its support.

The topic of this conference, judicial independence, is far less an abstraction for me today than it was a year ago. Let me tell you why. Just about every week at the court, we have a delegation of judges or justices from an emerging democracy around the world, judges who, in many cases, the threat to judicial independence is often a threat to their physical safety, certainly to their well-being. And yet, they are striving to establish an independent judiciary that can defend the rule of law in their country. They come to our country, and they come to the Supreme Court because they draw inspiration from the role and stature of the third branch in our democracy.

There have, for example, been 700 Russian judges who visited our country since 2001. Chief Justice Lebedev visited last year, and Chief Justice of the Russian commercial arbitration court visited; Chief Justice Haxhimusa from Kosovo. Just last week the president of Albania visited because he was seeking support for the judiciary in his country at a time of crisis for them.

Now, one Russian judge who visited our country and was later at a similar judicial exchange in Western Europe was asked at that conference which model of judicial administration he hoped to emulate. He said the American model. As you might imagine, that didn't sit too comfortably with his European hosts, and one of them said, well, if all you wanted was a can of Coke, you didn't have to come to Europe to get it. The Russian responded that he didn't much like Coke. He said he liked his wine French, his beer German, his vodka Russian, and his judicial institutions American. (Laughter.)

Now, it is not only emerging democracies that are emulating our model of judicial independence. I was fascinated to learn about the constitutional reform act recently passed in the United Kingdom, which sets up for the first time an independent supreme court in that country, taking the responsibilities that had been exercised by the law lords in the House of Lords, transferring them to the supreme court. The senior law lords said a couple of weeks ago in London that things moved very slowly over there, but after 800 years, they had decided there apparently was something to this notion of the separation of powers. (Laughter.)

Now, the world recognizes the importance and the rarity of the judicial independence that we have established in our country, and I think it's important that we recognize it as well. As Mr. Rose said earlier, my predecessor, Chief Justice Rehnquist, focused on the system of judicial review implemented by an independent judiciary as the one truly novel contribution of the American founders to the system of government. He called it the crown jewel of our system of government. The roots go back before the Constitution.

The Declaration of Independence faulted King George, among other things, because he had made judges dependent on his will alone. And our Constitution, of course, protected judicial independence by ensuring tenure during good behavior, protecting judges against the diminution of their salaries, and structurally through the separation of powers, and importantly, by conferring the judicial power on one Supreme Court.

These constitutional protections were reinforced in practical terms by important constitutional episodes in our history. The decision of the Jeffersonians not to impeach Samuel Chase in 1805 for his judicial acts, and the almost universal revulsion against FDR's court-packing plan – all of this has culminated in a culture that respects judicial independence. But as Walter Lippman has said, the acquired culture is not transmitted in our genes, and so the issue is always in doubt. That's why I think conferences like this are so important, because the attacks on judicial independence continue.

I would point out that they are utterly bipartisan. A few years ago, you could have read an op-ed piece in the New York Times in which the writer called upon political leaders to reprimand the overreaching Supreme Court. The writer said that leaders should not think there was nothing that they could do in response to court rulings. The writer noted that during Jefferson's time, Congress delayed the opening of the Supreme Court for over a year, threatened to impeach judges for their decisions, forced the justices to ride circuit so they'd be preoccupied deciding minor disputes, that Jackson and Lincoln defied Supreme Court decisions, that FDR proposed packing the courts. And the writer noted ominously, of course, Congress controls the court's budget and the court's jurisdiction. Now, this was a column by a liberal commentator critical of the Supreme Court's decision for being too conservative. More recently, of course, some conservatives have argued in favor of sanctioning judges for supposedly too liberal rulings. The long history of attack on judicial independence confirms that neither side in the political debate has a monopoly on the tactic.

Now, before going any further, I think I ought to be very clear about what judicial independence is not. It is not immunity from criticism. You don't have to agree completely with H.L. Mencken's definition of a judge, a law student who marks his own examination papers. (Laughter.) But there is a germ of truth in it, and our examination papers though are at least open for criticism and grading by the public at large. They're there for all to see, and informed criticism is certainly welcome. But it should not degenerate into attack on individual judges for the decision as a means of intimidation, and it should not take the form of institutional retribution, action against the judiciary as a whole, that might inhibit the judges from performing their vital function.

Now, judging is no different than any other form of human endeavor in this respect – we recognize that with independence come certain responsibilities. If the federal judiciary is to ward off dangerous intrusions by other branches such as the Inspector General bill that was passed by the House Judiciary Committee yesterday, we must show that we are capable of managing our own house.

Now, in recent years, concerns have been raised about the judiciary in three significant areas – judges who are sitting on cases in which they have financial conflicts of interest, attendance by judges at educational seminars sponsored by private parties, and the failure of the judiciary to properly investigate charges of misconduct against its own.

I'm very pleased to be able to report that last week, we took responsive action in each of those areas. In the first area, the judicial conference mandated conflict-checking software be used by judges in order to make it harder for financial conflicts to slip through. The judicial conference also mandated the policy of disclosure with respect to attendance at seminars. Entities that sponsor seminars have to disclose where their funding comes from. Judges then disclose whenever they go to one of those seminars so people can judge for themselves whether that's something that affects the judge's impartiality. I think that disclosure approach is much more preferable to what's been proposed in some legislation, which is that only seminars paid for by the judiciary itself can be attended by these judges. That would allow Congress through the budgeting process to limit what type of information judges obtain, and I think that would raise serious questions.

With respect to the investigation of misconduct, I received last week a report from the committee appointed by my predecessor Chief Justice Rehnquist and headed by Justice Breyer. It was to investigate how the judiciary has implemented the Judicial Disability and Misconduct Act of 1980. Now, I've learned, as I'm sure Chief Justice Rehnquist knew, that when you give an assignment to Justice Breyer, you get a thorough job. Justice Breyer concluded, along with his other committee members, that the only way to see whether this act has been implemented is to go back and look at the hundreds and hundreds of cases that have been handled, and determine whether they were handled properly or improperly. I recommend the report to anyone that is interested in it. It is exhaustive and comprehensive, and the conclusions are clearly supported. And the conclusions are twofold: first, that in most cases – the vast majority of cases – the judiciary did an excellent job at investigating the particular complaints of misconduct.

On the other hand, in a limited number of high-profile cases, the judiciary needed to do a better job. Procedures weren't followed as they should have been. The committee had listed exactly 12 recommendations that I transmitted to the judicial conference with the instruction that they take prompt action to implement them. In each of these important areas, we in the federal judiciary are taking responsive action to the criticism that has been raised. It turned out, I think, that the criticism was constructive in each of those areas, some of it was, and we took responsive action.

There's another way in which judicial independence entails responsibility. Judges – federal judges, state judges – need to recognize that judicial independence is not an end in itself. Judges are insulated from political pressures precisely because they're not supposed to be making political decisions, but deciding cases according to the rule of law. In the language that Mr. Rose quoted from the Federalist papers, judges have neither force nor will, but merely judgment. Judicial self-restraint, the discipline to

exercise merely judgment and not force or will is the necessary correlative of judicial independence.

There is a final responsibility that comes with judicial independence, one that I think President Reagan captured perfectly 25 years ago this week, a good week for him, the week that his first Supreme Court nominee was confirmed unanimously and took the oath of office. At a reception for judges in the White House, President Reagan said that the judiciary's, quote, "commitment to the preservation of our rights often requires the lonely courage of a patriot." Those words have stuck with me since I heard them. And to the extent that attacks on judicial independence emanate from conservative quarters, I would commend to those quarters those words from the leading conservative voice of our time, "the lonely courage of a patriot." President Reagan recognized that it was the job of judges to make unpopular decisions; unpopular with the populace at large, unpopular with particular social or professional elites. But he also recognized that the courage required of them was the courage of a patriot because in making those unpopular decisions, they were fulfilling the framers' vision of a society governed by the rule of law.

And just as attacks on judicial independence come from all parts of the political spectrum, so should the defense of judicial independence. I'll quote Hamilton from Federalist 78 again. Talking about judicial independence, he said that "considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts, as no man can be sure that he may not be tomorrow the victim of a spirit of injustice by which he may be a gainer today." The judicial independence we enjoy is extremely valuable. As I mentioned at the beginning, the world recognizes that, and we should, too.

I began by noting that Monday was Justice O'Connor's 25th anniversary of taking the oath of office on the court. As Mr. Rose has mentioned, tomorrow I will celebrate my first. And as we begin another Supreme Court term, I am confident that the justices and the judges around the country will not be found lacking in the courage that President Reagan indicated is often required in discharging their responsibilities. And through conferences such as this, I hope that courage may be a little less lonely than President Reagan indicated.

Thank you all very much for your patience. Thank you all very much for participating in this conference. I've heard amazing stories about what a great success it was. I'm happy to find out that when I was looking for justices around the courthouse today that they were gainfully employed in defending the judiciary, and I'm looking forward to starting the new term next week with renewed confidence in your efforts to help us protect the independence of the judiciary that is so vital to the rule of law. Thank you all very much.

(Applause.)

(End of Remarks.)