

The Role of the Judiciary: Panel Discussion with United States Supreme Court Justices November 10, 2005

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O'CONNOR, JUSTICE STEPHEN BREYER.

MODERATOR: Justice O'Connor, I am going to begin by propounding a compound question to you because I have never gotten to ask a compound question to a Supreme Court Justice.

JUSTICE O'CONNOR: [*Laughing*] Well, you might just get a compound answer!

MODERATOR: I have had so many people come up to me and ask me to ask you how did you get interested in rule of law work. After that opening, I would also like you to speak about a topic which you speak eloquently on every time I see you – and that is the independence of the judiciary in the foreign context.

O'CONNOR: Well, first why did I get so involved in these rule of law efforts. It was with the break up of the Soviet Union. And all of sudden, there was this enormous part of the world that was breaking up and forming separate nation-states. We ended up with twenty-six of them being formed. And they had to decide what kind of governmental structure they wanted to have. It was the just the most remarkable time in history. I do not think that we will ever see anything like it again. It was the idea of I think, Sandy D' Alemberte and Homer Moyer on behalf of the American Bar that we ought to volunteer as lawyers and judges in this country to help if any of these emerging states wanted some help. They made some inquiries and what do you know, they did want some help and an effort was made to provide it. And help was forthcoming by good hearted, well meaning lawyers and judges from across this country in the best American tradition of being volunteers. Now, that kind of sets us apart a little bit frankly from many countries in that we have such a strong tradition of volunteer service here. Help was provided for writing constitutions, for writing codes for criminal law, bankruptcy, you name it, and for just setting up structures of governance that might work.

Now what is the most important structure in a new government from the standpoint of a lawyer or a judge? It is an independent judiciary – one with

qualified judges who are honest, decent, ethical, intelligent and with the independence provided to them by their nation's charter to enable them to make fair decisions and not be afraid of following the law and being thrown out of office because they did that. So, that is a short answer to both questions.

MODERATOR: Thank you. Justice Kennedy, what is the rule of law?

JUSTICE KENNEDY: Piece of cake. I can not remember hearing the phrase "rule of law" when I was in law school. I think it is a phrase that has become current in the last twenty years or so. It resonates in *per legum terra*, a phrase used in the Magna Carta, "for law of the land," and you can see references to it, particularly if judges are in trouble, "Well, this is not the rule of law." But, it is a phrase that we ought to think about and ought to attempt to define, although I believe you should define it at a high level of generality, just so that we don't get bogged down in all the details. I was asked that question once in China. And in China, it's often effective to tell an audience that something has three parts . . .

And so I said, well, the rule of law has three parts. Number one, the government is bound by the law. That of course includes the court, and through that, you have judicial independence. The government is bound by the law. This probably reflects a large—well it is just a corollary of the larger principle. That the law must emanate from the people. Look, the law lives in the consciousness of the people. If you don't have that, you don't have law. And that's a corollary that the government is bound by the fact that the law must originate in the consciousness of the people and be sustained by the democratic process over time.

That's number one, the government's bound by the law. Number two, the law must treat all persons with equality, all persons in an equal manner. And without attempting an exclusive list of prohibited classifications, you can give some illustrated examples, because those classifications, those persons, those groups that can claim equal protection and that are discriminated against must be disclosed to us, as the law evolves, as time continues. We are blind to the injustices of our own times. So it would be unwise to have an exclusive list of those classifications that deserve equal protection. But illustrative of those classes are groups that are classified by race, color, ethnicity, gender or religious beliefs. That's just a partial list.

So first, the government's bound by the law. Second, the law applies equally to include all persons. Third, the law must recognize that in each person, there is a core of spirituality and dignity and humanity. And within that broad general formulation, you can begin to define those rights that are fundamental to our own humanity. And we'll leave it at that. Because again, the definition of human rights is something that evolves over time as we begin to understand ourselves and the world around us, which is the duty of every generation to study anew.

MODERATOR: Thank you. Justice Breyer, your recent book, "Active

Liberty,” has raised—has resulted in some very favorable reviews. I don’t know whether you’ve had time to look at any of them.

JUSTICE BREYER: No, I don’t look at them. [*Laughter*].

MODERATOR: In the book, you acknowledge America’s debt to the ancients: the far ancients, the Greeks and the Romans, and perhaps the near ancients, the French, the venerable Montesquieu, Benjamin Constant and Britain, of course. And you talk about the people’s right to an active and constant participation in collective power, and at the same time, you talk about judicial modesty as a concomitant part of this.

You are, I know, a student of modern constitutions. How is this active liberty of the ancients faring in modern constitutions, and how is judicial modesty faring as well?

JUSTICE BREYER: I think within pretty broad limits, it’s faring pretty well. Do you want me to elaborate? [*Laughter*].

MODERATOR: If you don’t mind, since you’re here. [*Laughter*].

JUSTICE BREYER: The point that I was trying to make in the book is really based on what Justice Kennedy said, elaborating from there. There are two interesting ideas that are terribly important to us and to other people about the kind of rule of law that we want. And the first is why I call that “ancient liberty,” the Greeks. It had a point besides showing the historical erudition, which some have found lacking. The point is that the idea, from ancient Greece on, was one of the ideas upon which our Constitution rests, and that is, all citizens—now, they had a rather limited idea of who those citizens were, and so did we at the time of the founding, but still—those who were citizens would participate in the creation of the government and the laws under which they lived. That’s called democracy, basically. And the Constitution, I think we all see, is a document first and foremost that creates democracy. That’s the first idea.

With the three of us—we’re at a meeting at Mrs. Annenberg’s where they were discussing what to teach high school students, and tell me if I’m wrong about this. They had asked the bar associations, and the ALI and other very, very good groups to say what was the main thing to teach, listed in order of priority. First Amendment tended to be the answer. Equal equality. And they had way down on the list something that surprised us to be that far down, because to us it’s number one. Number one. And we all said, this is number one. This is what the Constitution is about. What it does first and foremost is create a structure of government that is a democratic structure of government, basically. That’s the first idea. And we see that, and that’s why I say it’s doing pretty well. We all see that. There is no disagreement, I think, among judges or scholars or anybody on that one. That’s the first thing.

Now there are boundaries, and that is the second thing. The boundaries really became very important just after the French Revolution, when people

began to discover that if you let Democrats or Republicans—I don't mean to be partisan in that . . . [*Laughter*] But I mean, democracy isn't enough. Because acting under democracy, people can do terrible things. And if they didn't know that at the time of the revolution in France, which they should have, we certainly know it. We are old enough to remember the mid-20th century, Second World War, etcetera. I needn't point that out, but it's obvious. You cannot let even a majority trample very important rights of the minority. And that's the second part.

And we've written a constitution that has that as the boundaries. Now sometimes, we all argue like mad. But what are we arguing about? We're arguing about the precise nature of the boundaries. Is this on this side or that side, and we can disagree like mad over that. But that's implementing a system that creates boundaries protective of human rights, assuring a degree of equality, assuring a rule of law, assuring division of power. Boundaries that within there is a democratic space. Those two types are of the—are really, I think, what the Constitution is about.

And of course the book, it says, lets not forget that first one. Let's not forget the importance of democracy, because I think we as judges can say – we will tell you something from our experience. I don't know if you have to participate or don't participate. That's up to you as a person. But we can say, and I'll say, that the Constitution won't work if you don't participate, because the Constitution foresees a citizen-run country, that is, a government that depends upon the active participation of the ordinary citizen. Thank you.

MODERATOR: The chief justice came by, Justice Kennedy, and I wrote down what he said. I thought it was very interesting.

And later, some of our visitors came to me and also asked me to pose this topic to you. He said, "It was not that long ago that this place was an emerging democracy, and it is important for us to appreciate that the values we hold dear came at great personal price. We want to do everything we can to support our brave compatriots in other lands. The topic is individual courage, and I want to let you all talk about that."

But Justice O'Connor, I heard you speak about it in Wyoming, a specific example in Ukraine, and I wondered if you might talk about the personal courage of judges.

JUSTICE O'CONNOR: We really had an interesting situation in the world not too long ago, an example of judicial intelligence and courage. And there was an election in Ukraine for Ukraine's highest elected position, and there were two competing candidates. And the election was held, and immediately there were allegations by the declared loser of widespread voter fraud, and some of those were documented by election observers who had been there for the election. And a challenge was made in the courts and made its way to the Supreme Court of Ukraine, or the—whatever they call it—constitutional court— I don't know. There's someone here from Ukraine who can correct me on the proper title.

And that court did a remarkable job. They held hearings over a period of about five days, and they agreed to have it televised so that every citizen in Ukraine could listen to the arguments and hear the evidence being presented on both sides. And the court reached a conclusion that there had been voter fraud and declared that there had to be a new election. And because of the, I think, widespread opportunity for citizens of the country to see for themselves what the allegations were and how they were dealt with, there was acceptance of that decision. And a new election was conducted and it altered the final outcome, but it was done without bloodshed in an area where it wasn't at all clear that that necessarily would be the case. And I thought it was a very important milestone occurring in relatively new nation-states, one that had organized itself well enough to survive what could have been quite a crisis. Very impressive, I thought.

JUSTICE KENNEDY: Yeah, the higher up you are on the judicial ladder, the less discretion you have in a sense or even the law enforcement ladder. The most discretion with a police officer, he's going to charge you or not; and the United States Attorney or if it's a federal system; or district attorney and then the trial judge. By the time you get to a high appellate court, there's not that much discretion, and there's a lot of insulation.

We get criticized from time to time in the newspapers, and one of my children will say, "Hey Dad, how are you doing?" Because they've read this lousy article. [*Laughter*]. That's nothing. There are trial judges worldwide, who have to live in the community after they've made an unpopular decision. That's hard. And there are judicial heroes throughout the world, including in our own states where they're elected judges and have to make unpopular decisions and they do, and that's not written about enough. And you know all— you know those examples. I could repeat many, many of them.

But if we can foster a climate, if we can nurture the idea that there is such a thing as a profession of judging, as a commitment to judicial independence—and we can talk about what that would mean—and if the people understand, then they will respect this thing we call the rule of law. They will respect the independence of the judiciary. But this is a matter of educating. Look, democracy is not inherited. You don't take a DNA test to see if you believe in freedom. It's taught. And you can't comprehend what you have never studied. You can't defend what you don't know. And we must do a better job of educating our own young people in this nation and of people around the world. It's the essentials and the requisites of what Stephen was talking about in regards to a democracy being a structure with certain rules. And I don't think we're doing a good job of educating our own young people, and I don't think we're doing—you can never do enough—and I don't think we're doing enough in the rest of the world.

MODERATOR: Justice Breyer?

JUSTICE BREYER: What would I add to that? I'll add something that

Justice Kennedy said that I quote a lot because it meant something to me at the time and still does. We were talking to a group of Russian judges about ten years ago. The Russians, after all, remember, had what was called telephone justice, as they did in Eastern Europe. The telephone would ring, it was the party boss saying, “decide this way or that way.” And we’d heard them talk about why did we do that, and they said, “It’s obvious. Our children needed the apartment, we needed the education, and there was not too much choice.” And they’re trying to get over that. And that’s why Justice O’Connor, and you and others, have gone to Eastern Europe to help them build institutions. And we were having dinner with some of the people who were trying to do it, which isn’t always easy for them, by any means—a lot harder than here.

What he said to that group rings a bell here, though. He said, the thing about judicial independence, when you apply it, and when you take the decision independently, nobody will know whether you were or were not. They won’t know, but for you. I mean, the newspaper says how brave you were. I don’t mean to sound cynical, but sometimes that means they like the results of your decision.

The lawyers? Well, they know the record, and you want to be true to that record. But they do have a view of this, and they do perhaps react in light of their advocacy.

The other judges? Maybe. It depends on how involved they were in the case.

And ultimately, it can’t be a question of whether the greatest civil right groups in the world or the greatest wrong groups in the world or whoever they are say you’re good or bad or independent or not independent—in here. And other judges may know sometimes what you’re going through, but they can’t sympathize very well, either, because it isn’t them, it’s you. And when you know, you know. And the problem—and that made a big impression. I think that’s absolutely right. And I think the problem for all of us is to try to create those institutions, including here at home, where you get a pretty good assurance that that’s what will go on in your case, whether your case is the most minor thing in the world or the most major, whether it means a lot to your client or only a little. It’s easy to say that it’s important, and it’s hard to do—the building of that institution.

JUSTICE KENNEDY: Judicial independence is such—judges almost overuse it. If you were all a group of judges, 100 percent judges, I say I’m here to talk about judicial independence [*Applause*] because it sounds somewhat like a kind of guild protectionism.

JUSTICE BREYER: Yeah, that’s true.

JUSTICE KENNEDY: But it’s much more fundamental than that. Judges must be independent not so they can do as they choose, they’re independent so they can do as they must . . .

JUSTICE BREYER: And I'll give you an example. Can I give an example? This is sort of funny in a certain way. Because I'll sometimes, as you may or may not realize, say something that I think to myself is uproariously funny [*Laughter*]. Or at least meant in a comic way, and the audience might not understand it. So we were talking at one of these groups at the bar association, and there were some judges there from a different country. I'll not say which. And they were talking about judicial independence, which mostly meant salary increases—which it can mean here, too, you see. [*Laughter*].

But the point was, they're going on about it and I said that, well, I know it's really hard, but to build that independent institution, I think it's hard for you, the judge, to tell the public how important it is, because the public thinks, of course you think it's important. It's your job. You've got to get other groups to do it. And the other groups have to explain why it's important to people who aren't judges, who aren't lawyers, you know, the public. Why do they benefit from it? That's what's hard to explain. There are only two people who can do it. One is—I said they're both such pests, really. We just get so annoyed at them because they do so many things that irritate you. The first is the press. [*Laughter*]. I said I know they're trouble, but they have to be enlisted in this, and you have to have the free press, or you won't get what you want.

And the other I said is the bar. Those lawyers can be very difficult sometimes. [*Laughter*].

But basically you need the bar, because they're the only ones who understand it. They're the only ones who understand it, who can explain it. So remember that. A free bar, and a free press. So the other person gets up from the other country. He says, "Justice Breyer is completely right. The press and the bar are terrible pests." [*Laughter*].

JUSTICE O'CONNOR: Well, judicial independence really is sort of hard to define because judges can be subject to discipline for legitimate reasons. And the political branches, of course, control, correctly to some degree, both the jurisdiction and the political makeup of most courts in most countries. And on the other hand, I'll coin a phrase, "I know judicial independence when I see it."

And just suppose that during a period of stormy relations between the White House and the Chief Justice, the president's bodyguards killed the Chief Justice's pet cat? Or suppose the executive branch threatened to cut the water supply to the Supreme Court building to prevent the court from meeting and making anti-presidential statements? Or suppose the Council of Ministers tried to evict the constitutional court from its offices?

Now the first two events actually happened in the early to mid- 1990s in Russia under Yeltsin. And the third happened in Bulgaria in 1995. Now, I think we can all agree that those aren't examples of judicial independence. And judicial independence just doesn't happen all by itself. It's very hard to create, and it's easier then most people imagine to destroy. I mean, we face certain issues in this country today by various members of our nation's legislative

branch suggesting a number of ways to strip courts of jurisdiction, perhaps have mass impeachments and all kinds of criticisms that don't suggest a wide-open notion of judicial independence. So this is not easy, either here or in any other country of the world.

JUSTICE KENNEDY: But the bar must also insist that judges be held to a certain standard.

JUSTICE O'CONNOR: That's right.

JUSTICE KENNEDY: They just must give reasons for what they do. I sometimes say we're the only branch of the government that has to give reasons for what we do. [*Laughter*].

And, the bar has some very special duties with reference to the judiciary, and both Justice Breyer and Justice O'Connor have indicated that. Lots of people think judges have a lot of political clout. Once they get on the bench, they don't. And we really rely, first of all, on members of the bar to defend the judiciary when it is under attack. This is a little easier in the Anglo-American legal system than in other systems. In our system, as you know, in our tradition, judges are selected from the ranks of the practicing bar, and that gives us a built-in bond and affinity and affection over time. And there's this close relation, and we can rely on the bar to defend us when independence is under attack.

In other countries, as you all know—many better than I do because you're from those countries—you elect a judicial career very, very early after you've finished your education, and you go two separate tracks. You're going to be a judge or an attorney for the rest of your professional life. And in those countries, I think it's important that we do a lot more work to impress upon both bench and bar that they are allies, not competitors. They are working in a single cause, which is the cause of justice, which is the cause of the law, which is the cause of independence. And there are bar associations around the world that I think we should begin to work with and have them meet with their judges and discuss problems of common concern to address mutual problems. I think we can do much more in that regard, Judge Henry, than we're doing.

MODERATOR: Thank you. If someone wants to begin to bring me some of the cards, I would appreciate that.

Justice O'Connor, one of the things you mentioned brought up another topic that our visitors wanted us to talk about, and that is, judicial discipline and codes of conduct. I wondered if you might give us your views on how important the code of conduct is, and what it can do to develop the authority and independence of the judiciary.

JUSTICE O'CONNOR: I think it's pretty critical at all court levels to have codes of judicial conduct, so that the judges serving in those courts have a clear understanding of conduct that is acceptable and conduct that isn't. And it can be particularly challenging in newly formed countries, or countries where a certain amount of telephone justice has occurred, or a certain level of corruption has

been going on for some time. And it is crucial to get a code drafted telling judges what is and is not acceptable, and to set up committees of people who can enforce violations of the code, can call judges to account when a complaint is made, and when they determine that there has been a violation. I think it makes a tremendous difference in enabling the public of the nation to have a little bit of confidence in the impartiality and the fairness and integrity of the judges that are serving.

JUSTICE KENNEDY: Justice Breyer and I—and Justice O'Connor, you were actually there the day before—we were with a group of judges, and we were talking about judicial ethics and judicial discipline, judicial codes of conduct. And we explained that there's some very simple—there are basic rules. You don't have ex parte contacts where the judge talks to one attorney without the knowledge of the other. You do not sit in cases where you have conflicts. These are very simple things—rudimentary rules.

And we talked about this for an hour, and then I asked if there were any questions. And a judge stood up—and he was a friend of mine from another country—he said, “Justice Breyer, Justice Kennedy, thank you very much for speaking with us about these things. There's not one suggestion, not one precept, not one principle that you've mentioned that we disagree with, that we don't long for or to which we don't aspire. But the culture of my country just will not allow that.”

Well, it was one of those moments where you're having a meeting, where everybody's quiet; they're looking to you for an answer—a defining moment. And I just—I wasn't sure what to say. All I could say is, “Judge, this must change. The rule of law is on the line. You cannot wait, hoping that a judicial independence, an independent judiciary, will emerge out of an atmosphere of corruption. You must change it and you must change it now if you're going to defend the rule of law.”

JUSTICE BREYER: Yeah, well, one of the things—that's not popular abroad, and it's not popular at home, but I think it's absolutely necessary—I tell often the judges, just in respect to that, that we fill out these forms every year, and it's expensive to do because we have to hire an accountant, probably. And those forms report every single penny. No, there are no loopholes in it. Every single penny that I earn, or my wife earns or gets from any source whatsoever of income, or the minor children and all the assets that you have so they can be compared year by year. And there is no way, given those forms, that some surreptitious form of income could come through to benefit the judge. Are they a pest? Yes. They're expensive, and they put in the newspaper how much money they guess you have by multiplying the top of every category. [*Laughter*]. And nobody likes that. Nobody likes it. And they're right not to like it. But they're wrong to oppose it because I think it is absolutely necessary to have those kinds of assurances through the press that they're—and you have to—that there is not dishonesty going on within the judiciary. And there are prosecutions of judges

from time to time. And you have to toe lines. But that the public sees there are those checks in play as well as the ethical rules, as well as the reasons for the opinion, I think all help to assure a public that this can be an institution that can be trusted with independence.

JUSTICE O'CONNOR: I think regular financial disclosure is a very important tool. And yet there are some countries in the former area of Eastern Europe which had experienced so much unfortunate invasion of privacy during totalitarian eras that their constitutions protect privacy to such a degree that they are unable to require financial disclosure, which I think makes it pretty tough.

And you have some questions.

MODERATOR: I do have some questions. [*Laughter*].

JUSTICE KENNEDY: I've got a lifetime job. That's okay.

MODERATOR: Some of these are on oil prices. [*Laughter*].

Now here's one you don't often get. Do you have any views on the significance to a discussion on the rule of law of such historical documents as the Code of Hammurabi and the Edict of Cyrus?

JUSTICE O'CONNOR: Whoa! [*Laughter*]. I haven't read —

JUSTICE KENNEDY: I was reading it last night. [*Laughter*].

JUSTICE O'CONNOR: Oh, gosh. Well, I think [*Laughter*] we're deep in Iraq, and that's where the Code of Hammurabi can be found [*Laughter*] and we actually have taken a look or two at that recently, just out of historical interest. But I can't say we've looked at the —

JUSTICE KENNEDY: It's a deep-seated desire of a human to organize his or her society. And we were very fortunate; there was a congruence of factors at the time of the founding. And I teach constitutional law; I sometimes ask any students if they've read the Constitution cover to cover. And they usually say no. I say, well, if you do it, it's one of the great documents in the history of human thought. If you do it, your mind will wander. You can't read it cover to cover without your mind wandering. But if you go to specific portions of it, you can learn and it is a brilliant document.

The Declaration of Independence you can read through, cover to cover. It was designed to be read to the troops to get them angry at King George. The mad—the longer you read it, the madder you'll get at King George. [*Laughter*].

And both of these documents are different. One is to instill with you the passion for freedom, and the other is to make freedom work.

JUSTICE BREYER: The Edict of Cyrus? [*Laughter*]. I myself am not an originalist. [*Laughter, Applause*].

MODERATOR: That's very, very ancient liberty.

Is it possible to reform a judicial system that is corrupt without changing the people? Do they ever see the light?

JUSTICE O'CONNOR: Well, they could, obviously. It depends on the

person. It's just like finding people who are other offenders of the law, and you take correct—and you find them responsible and suggest ways of education and training, and sometimes they turn around. So it could happen with judges as well. And I would think that would happen if the country installed a pretty good code of ethics with teeth and started enforcing it. I think that could happen.

JUSTICE KENNEDY: Part of the problem is, as many of you know—in fact, it's in other countries—is that there is—it's part of the economics of being a judge that you get money from outside sources, and this is wrong.

When we go to different countries, I like to meet with legislators as well as judges. And I tell them that you must appropriate resources for your judiciary because the judiciary and the legal system are part of the capital infrastructure. Now you're a legislator and judges come and say, "Well, we need higher salaries, and we need more judges, and we need courthouses, and we need"—you need schools, roads, hospitals. You've got people that are hungry. And you go back and you tell your constituents, "Well, I voted for a lot of money for the judiciary." That's not an easy sell.

So it must be understood that the judiciary is part of the capital infrastructure. It's as important as roads and bridges and utilities and schools. You can't have a progressive society without a stable rule of law; without a functioning, efficient judicial system.

MODERATOR: Justice Breyer—that's what it says here [*Laughter*] where do you consider Latin America will/should go in the 21st century in developing a rule of law? How should the legal profession in the Americas contribute?

JUSTICE BREYER: That's a good question. . . [W]e've been working to try to answer that question. The reason I think it's a very interesting, important and difficult one at the most general level is what Alan Greenspan said, that most of the countries in the world—indeed, all of them—want to have a rule of law for two basic reasons. More and more, they've realized that a rule of law means not just human rights. It means also contract law; it means also that maybe when you invest, you have a neutral arbitrator who's called a judge who can get you your investment back if you're entitled to it. And it isn't going to be decided politically. And the more you can assure that kind of institution, the more you'll get the investment and the more prosperous people will be. Prosperity. And of course it does include human rights. Prosperity and liberty. So those are the two slogans, which are more than slogans.

How do you get there in Latin America? My personal view of it is that they find it difficult in part because they see two separate systems. Most of them have codes. Most of them base their law upon the Code Napoleon, which was all over continental Europe and came to Latin America. And they also want the kinds of protections that you can find in some separation of powers—independent prosecutors and protection of basic human rights and an independent judiciary—which is probably predominantly found in Britain and the United States.

Now how to combine those things? My own view is they have to be combined. I don't have the answer, nor do any—I bet few of us have the answer for any single other nation. I think what we are trying to do is to give those who are in those countries, judges and others, an opportunity to learn something about our system, and I would say also learn something about the systems in Spain and France, continental Europe, so that you can go back and figure out what works best for you because we don't know the answer to that question.

Our current effort, if I can have fifteen seconds of advertising . . . is to try to see if in Puerto Rico we might be able to establish an institution that helps to do that with teachers from Europe as well as the United States and a potential audience of Latin American judges, because there you have this mix of the Spanish language and English, and the Spanish culture, Latin American culture, as well as that of the United States.

But there, I think that is the direction. And the more we say it's just us, I think the more wrong we are. The more, if we say, you have to learn enough from several systems so that you can figure out what's going to get you that prosperity and protection of liberty that you want, I think the better off we are.

JUSTICE KENNEDY: But Stephen, don't you see particularly in Europe, being the example, and I think it will soon be evident in South America, there's a convergence of code system, codification systems, and a structure of a transnational human rights documents or basic constitutional documents which are interpreted by an independent judiciary to elaborate rights. These two systems are merging.

JUSTICE BREYER: I did go to a conference in France, which I found very interesting, actually, as well as enjoyable. But I sat there for a day and listened to a lot of speeches which—various judges who came there about the 200th anniversary of the civil code, which is really like the Constitution. It embodied all kinds of basic values of great importance.

At the end of this quite long set of speeches, they had a few questions. A person got up—a man got up from the audience. Three questions were asked, and the second one is very relevant to what you said.

The first question, of course, we could have heard anywhere. He said, "This code has been modified to embody the equal status of women. So why is it over a day and half we haven't seen one woman?" I said, that's a question I could get in Boston or Washington or anywhere else.

Second question, the same. I could find it anywhere. We say just what you said, but we're not certain what to do. I mean, our French system is now only one of several, and these several more and more are necessary to the businesspeople in our country, for example.

And are we supposed to refine our own codes? Are we supposed to try to integrate that code with a European code from different nations? Are we supposed to write a new European code from scratch? What should we do? So I

say the tendency is there, and the answer is not clear. . .[W]e find similar how we do integrate, in commercial cases, a large amount of foreign law, and integrate it into the heads of the students who will become the lawyers, who will have to have those cases where American law alone is not going to give them the answer they want.

And the third question, of course, I'll simply repeat, because we all believe it. And that was the question—she said, “Well, how are we going to teach these values?” And by that I think that the questioner certainly meant that human liberty as a basic fairness and so forth of that Napoleonic code of 200 years ago, how are we going to transmit them to our children? My goodness. That's a question we all face all the time.

So as I say, I could've heard those questions in Paris, I could've heard them in Des Moines, or Boston, or probably anywhere. And those are the ones that you have these conferences not to answer, but to get people working on them.

MODERATOR: Here's one you can knock out of the park. A recent article in *The New York Times* suggested that all justices and judges have one common denominator: baseball. Please explain to a non- American. [*Laughter*].

JUSTICE KENNEDY: That's a sensitive subject. I want to change a rule in the rules of baseball, and it's almost as hard as changing the Constitution of the United States. I'm having a tough time. [*Laughter*].

JUSTICE BREYER: I don't think I can explain it to a non-American. [*Laughter*]. A little hard. Just watch the game. [*Laughter*].

MODERATOR: Noah Feldman says American baseball is a non-mobile concept. So —Justice O'Connor?

JUSTICE O'CONNOR: Well, now, it did move to Japan —

MODERATOR: It did, indeed.

JUSTICE O'CONNOR:—to Cuba, to lots of countries. And, not that I'm just the strongest baseball fan in the world, but I do think that baseball players are the best athletes in the world because they have to run fast—[*Laughter*].—they have to throw, they have to catch, they have to make instant decisions. And it's pretty impressive, all put together. [*Laughter, Applause*].

MODERATOR: Any other concurrences, dissents on that? [*Laughter*].

For Justice O'Connor, fundamentally, the role of the justices of the Supreme Court of the Philippines in promoting the rule of law [is] in deciding cases in accordance with the constitution and the law involved, that is the role. As a woman magistrate in the highest court of this country, I would like to know some of your experiences. Kindly give me advice or suggestions on how women can enhance their abilities to promote rule of law in higher courts.

JUSTICE O'CONNOR: Well, of course, I think there ought to be women on all courts at all levels in all countries. [*Applause*]. Women constitute a little over half the population of most nations in the world today, and to the extent that we're living in democratic societies, I think it gives the public more

confidence to look at their nation's major institutions, including courts, and to see that there are women on those courts and other governmental institutions. I think it is a factor of importance in having citizens have some faith and trust in the institutions serving them.

And how do you get there? You just have to work hard to do a good job and be noticed in whatever you're doing before you ever are selected or considered for that office. I don't think it's necessarily easy in every culture for women to make that progress, and we see parts of the world today where there are very few women in office. And my heart goes out to them, frankly. I would like for every nation to have decent representation of women, and I hope that we can all reach out and offer suggestions and help around the globe to make that happen.

MODERATOR: Justice O'Connor praised the Ukrainian court for showing its hearings on television. Would there be a similar benefit in public respect for America's system of law if the U.S. Supreme Court –

JUSTICE O'CONNOR: Now I knew that was a bad thing to talk about [*Laughter*] because there are those in this country who think that there should be no increase in pay for judges in this country until there's television in all the courts, including ours, and there is some debate among judges in this country about the desirability of television cameras in the courtroom. But there are times and places where I think it can be very helpful, and Ukraine was a perfect example.

I don't think in this country there is a total consensus as yet on having cameras in all courts. Most of you probably saw that criminal trial in Los Angeles involving a prominent sports figure [*Laughter*] and it went on for weeks, if not months, and was shown around the world because the trial judge had the camera in the courtroom. And I thought it was pretty sad. I was very uncomfortable with it.

JUSTICE KENNEDY: Sometimes if the system is flawed, the people ought to know it. And if television shows a flawed system, then let them see it.

JUSTICE O'CONNOR: Well, we saw it there. [*Laughter, Applause*].

JUSTICE KENNEDY: But television can be a teacher. And if we were going to have a debate on television in the courtroom, and you drew the affirmative side of the debate, you could make probably more positive points. And we sometimes wish lawyers were better prepared, but they haven't seen us at work. If they had a videotape or a DVD, then they could see it. So you can make a lot of arguments for it.

But remember, by not having the press in the courtroom, we also teach. We teach that our court is based on the reasons that we give in our opinion. We will be judged by what's in those opinions on the books . . . Our timeline, our language, our grammar, our ethic, our chronology, our dynamic are different from the political branches. Not better, not worse. Different . . . And by keeping

the TV out, you teach that.

JUSTICE O'CONNOR: We do have the press in the courtroom. They're sitting right there taking notes. We also have audio tapes made of every word spoken in the courtroom. So it's not that the press isn't there. They are. But we don't have cameras, as yet, in our court, although in many courts around our country we do.

JUSTICE KENNEDY: There are a number of people who want to make us part of the national entertainment network. *[Laughter]*.

JUSTICE BREYER: It's actually a pretty difficult question for me.

JUSTICE O'CONNOR: Yeah, it is.

JUSTICE BREYER: There are things to be said for it, which were said, of—it's very—it's the teaching thing. I think of that term limits case that we had which was such a difficult case. Hamilton's on one side, or Marshall's on the other, and Madison says one thing. You go back to history and then you look up to date—and it's really an evenly balanced case. And the judges are all up there trying to figure out how to get to a right answer. It'd be wonderful, I think, for the court, if people saw that. And also you do have the problem of uncovering things, on the one side. But then, I think what bothers many people, at least me, on the other side, is that if it were in the Supreme Court, I think it would become a symbol for every court, and therefore it would be in every criminal trial in the country. And when I start thinking about witnesses . . . I don't want them thinking how they look to their neighbors —

JUSTICE O'CONNOR: And jurors.

JUSTICE BREYER: Right. I think about that, and I do think about the O.J. Simpson case. And I think I'm not certain I would vote in favor of having it in every criminal trial in the country. And then I also think a problem in the appellate court is that when we decide something, it's decided for millions of people. Of the millions of people who will be affected, only two or three are actually there in the form of parties.

And when somebody watches something on television, they tend to identify with the individuals in front of them, and the human story before them, and not the boring, legal issue that affects millions of people who are not on that screen. Now I'm not saying that that's determinative; I'm saying those things are negative features of having television in the Supreme Court, as well as the fact, of course, that ninety-eight percent in a case is in writing, oral arguments two percent or five percent, but everybody would think the opposite.

Now, if you have some things for it, and some things against it, how would I proceed?

JUSTICE O'CONNOR: Slowly.

[Laughter].

JUSTICE BREYER: Right. Correct. And I said fifty times, on television as I see us here today—I said, look, if I, being an old teacher, I would say to those

who want it, since they want to change the status quo, to get some neutral facts. There are plenty of places that have it, plenty who don't. There are people who are not paid by the networks or paid by the press that are called neutral research institutes. So let's look at public attitudes. Let's see if the concerns of those who don't want it can be shown to be valid or invalid. Let's do a little work before deciding the things just as a matter of principle. Because principle here has to overcome an obstacle, and the obstacle is, I believe that each one of us on the Supreme Court of the United States really thinks that he is a trustee for a marvelous institution on which the public depends, which neither he nor she created. I didn't write *Brown v. Board of Education*. I wasn't on the court that desegregated America that abolished that rule of law that was so vicious. But the court's reputation today, and its acceptance, depends on those other people. Every day we see in front of us, every day—I've said this five million times, so I might as well say it five million and one—we see men and women of every race, every religion, every point of view, who have come into our court to resolve their differences under law that's taken 200 years, it's taken a Civil War, it's taken eighty years of segregation, it's taken paratroopers in Arkansas to take the black children into the white school—it's taken a lot. And we are trustees of that institution. And none of us, I think, wants to do anything to harm that institution, irrespective of what kind of slogan you can give for one side or the other.

And therefore, I'd say, generalizing from my own experience, a decision of this issue, this kind of issue, which carries with it threats to that institution as well as benefits, should be decided after really pretty serious research and study, and not decided on the basis of something that happens to strike somebody two minutes in a conversation. And that goes, by the way, for me as well as for everybody else.

[*Applause*].

MODERATOR: Justice Breyer noted that Americans argue heatedly over the contours . . . of the Constitution. But all Americans see the constitution as sacred, almost in a religious way. Why is that? And isn't that the essence of what we call the rule of law?

JUSTICE KENNEDY: I was in Poland . . . and a judge said, how do you keep the Constitution for a long time? Very important for Poland; they've only had theirs for a few years. And I wasn't sure how to answer the question. And I said, ultimately the people have to come to revere their Constitution. America is very fortunate because there was a congruence of factors. When we declared our independence, we said we wanted freedom. And the people in England and Western Europe said, 'Freedom? What are the Americans talking about? There's nothing you can do with those people on that side of the Atlantic. They have all the land they want, they can do what they want. Pay taxes when they want, not when they don't want.' And so we had to give them an answer back. We had to fax them an answer so that we could justify the Revolution. And the answer was first in the Declaration and then in the Constitution. We use the Constitution to

define the meaning of our own existence as a nation. Americans come from many backgrounds, from many countries, but in large part they define themselves as being one people because of the Constitution. And that's a felicitous, priceless link that America has with its Constitution. And we must never sever that link. We must never endanger it. And it's very, very fortunate that Americans identify themselves with their Constitution. And that's a strength, and that's our strength.

JUSTICE O'CONNOR: I was just going to point out that one reason our Constitution has survived so long is cause it's so small. There it is! Look at that!

[*Laughter*].

And every American can pick up this little document and read it and understand it. And it's okay. Do you remember when the European Union tried to write a so-called constitution? I think it was about 450 pages long. And then people were expected to vote on it. How could you? So I think brevity has been great. And it dealt only with structure until the Framers were told if you don't include some fundamental rights in there, we won't vote in favor of it. So we got the first ten amendments, the Bill of Rights, and that's what people respect and admire and have grown to know and understand. And it worked pretty well. If a constitution gets long and complicated, it's going to be amended often and it no longer becomes that treasured little charter that might survive. And this is written in very broad language.

JUSTICE KENNEDY: One of the things the court does is to explain that the Constitution has relevance in the context of your own time. The flag—not flag suit—the flag-burning case was a case in which Americans get infuriated when you burn their flag. We have a beautiful flag. It's a transcendent symbol of national unity. And we had a case where people were put in jail because they burned the flag. And I thought this was a great teaching case; it teaches that the Constitution has meaning in your own time. And I remember we talked in the court before we issued the decision, how unpopular it would be. And ninety senators went on the floor of the Senate to denounce the decision. But over time, there was a quiet reflection and people said, you know, that Constitution means something to me; it's got this First Amendment. The government can't take away my right of speech. And it was just like *Gibbons v. Ogden*, one of the popular decisions in the Marshall court. Steamboat fares all over the Atlantic dropped after *Gibbons v. Ogden*. And people said that Constitution up there has something to do with me. And so we must never forget to teach Americans, particularly our young people, that the Constitution has a meaning now.

MODERATOR: I'm trying to—some of these questions are really not on topic. And I'll answer those after the meeting.

[*Laughter*].

When you have a judicial system that is both corrupt and not independent, can you solve both problems at once, or do you have to address one before the

other? Both corrupt and not independent?

JUSTICE O'CONNOR: Boy, I don't know how to answer that. I'd think you'd want to tackle the whole business and try to get a system that would affect the selection of judges more favorably, and try to build in a structure and a little education for the nation as a whole on what we mean by judicial independence. It has both an institutional component and an individual one. You want judges who aren't just free to go do any crazy thing in the world; they're bound by the text of the Constitution and the law, and they're bound to apply it fairly and impartially.

But individual independence means that a judge can freely resolve questions based on the Constitution and laws of the country without fear of reprisal because it ends up being an unpopular decision.

They won't find their pet cat murdered, or their salary diminished the next day, or their apartment taken away.

And institutional independence, in the sense that the other branches of government understand that the judicial branch is separate and apart, and may make decisions that at times the other branches don't particularly like. And that's so hard to do. I mean, these things don't happen naturally, it's the result of a tremendous amount of effort by citizens in a country to embody these principles in their nation's laws and constitution and then to make them work.

JUSTICE KENNEDY: There are some models—and this is not precise—I'm going to talk about South Africa, not because their judiciary was corrupt, but that it lacked respect because it was chosen under the rules of apartheid. What do you do? Do you dismiss all of them and start all over? You don't have the resources. You need judges. So what was done in South Africa is they kept that system, but then they created a new court as a superstructure. So that was one—that isn't necessarily part of the corrupt problem.

MODERATOR: What can concerned citizens do to encourage popular analysis of judicial decisions on the basis of the legal principles at issue rather than the presumed political or partisan orientation of the judges?

JUSTICE O'CONNOR: Well, I think you have to hope that you have some intelligent media reporters to interpret decisions for the general public. And we don't always have that, although I think we're blessed with having a few here. But that's certainly an important component.

JUSTICE KENNEDY: Newspapers do a fairly good job of reporting what we do, not why we do it. And I understand that, because of their short timeline, you have to have the news today. So I think the reporters, by and large, given their timelines, do a good job.

What I can't understand is why editorial writers for major newspapers in major cities that are proximate to us [*Laughter*] will write an editorial without reading the opinion. And it happens all the time. I'm just baffled by that.

JUSTICE BREYER: I think that there are things to do there. Namely, the

bar being organized can help in two ways. I think one way, at least if we're talking about the Supreme Court, is to meet occasionally with the newspaper editorial board or the editors of the local paper and encourage them, first, to have reporters who've developed a little expertise in the area. I think the difference in our court between a full-time reporter—I say, everyone thinks they do a good job. They're there all the time. They understand it. You read pretty much in *The Washington Post*, in *The New York Times*, and some other ones where they have good reporters, I think, who read what's going on, in my opinion, pretty much. And by the way, if I think it's—I say only pretty much because I think it wasn't quite right, I think at times maybe they're right and I'm wrong. I mean, you know, they do a good job if they're professionals. And if they, for reasons of economy, as happens more and more, they cut that full-time legal expertise and say, oh, we'll give it to the person who covers terrorism, after all, there's a lot of terrorism cases, well, I think that's goodbye to the kind of analysis that I would like to think the public should understand. So I think the bar can be helpful in just saying: Cover it. We're not saying anything about the words, just cover it properly.

And I also think they can be very helpful in making certain that judges in this context, or maybe just lawyers, sometimes talk to the local papers about the nature of the judicial institution. I can't tell you how—what positive responses we get sometimes not because of the words that come out of our mouths, but rather because they see what we're trying to do, if only from attitude. And people aren't prepared to understand that there are institutions called judicial institutions that do try to approach these questions without a political content. Today, they don't understand that. And the bar can explain it to the reporters and show them, show them. And then, of course, you can set up ways of explaining particular cases that they may develop trust in. And if they do, they'll have a better understanding of what the case is about. But I underline all this—that I think members of the bar and bar associations can play a very important role in helping the public understanding in this respect.

MODERATOR: I have one more question for the two of you, but we need to let Justice Kennedy go. I'd like to present you with this watch for [Laughter]. I do think we need to thank Justice Kennedy. He has a speech that he has to go make.

[Applause].

I hold in my hand the last question. I think this is really important, and I want to hear the answer, particularly. In terms of aspiration, what do each of you want this group to do or think about now?

JUSTICE O'CONNOR: Oh. We're so blessed at this meeting to have people here from at least forty different countries from around the globe. That's remarkable. And the fact that we're assembled under one roof and talking to each other about something that I think there's no disagreement on, and that is the notion of the rule of law is a sound one, that it helps a nation evolve in ways

that enable the citizens of the nation to have their rights protected, to have their commercial agreements enforced, to have the country function as it should. It's so important to each one of us.

I want things to go well in my country. I want to feel that if there's a real dispute, that it can be solved fairly in the courts. I want to feel that people are going to be able to protect their fundamental rights through our court system. And I think there's kind of broad agreement about it. But we achieve those goals in different ways, and every country has to develop its own institutions and its own way of approaching it. Some of the countries here follow a civil law system. Most countries in the world do. And that works. But you can still have the same fundamental concepts, at the end of the day, of rule of law and an independent judiciary to help make it work. And I just hope that those concepts can spread among additional nations around the globe and really make the thing work. If we want to have any kind of global understanding and peaceful relations with other nations, I think we have to rely on the institutional notion of rule of law, and along with it, an independent judiciary. So that's what I'd like to see have happen. [*Applause*].

MODERATOR: Justice Breyer?

JUSTICE BREYER: I certainly agree with Justice O'Connor. Thinking that, as you can see, my predilection is to want action and to think that the judges can't do it. I would take as a given what is really an experiment. It's a gamble. And Brandeis or Holmes said that something was a gamble, maybe it was free speech, like all life is a gamble. It's a gamble as to whether this institution called an independent judiciary can help, help—maybe only in a small way—guarantee basic liberty and help with prosperity. But we all accept that gamble in this room, and that's taken as a given, and we're trying to do more for it.

I think that the institutions are right. It has to be the bar, and it has to be the press. And the bar and the press organize. Who's going to organize? The bar. Because the bar, however much they dislike this judge's decision or this judge, understands the need for the institutions. And so basically, we need your support. And the judges in other countries need similar support elsewhere. I mean, it's a bar association. One thing this bar association really understands is to help to organize bar associations. I mean, they're great. I mean there are 600,000 or maybe 700,000—that's what I usually say, it's the ABA, isn't it? That's why I usually say it's 700,000 lawyers and 800,000 committees. They understand how. [*Laughter*]. All right? Then do it! The organization at a lot of levels, whether it's here or abroad, and the bringing in of the press, the tensions between the institutions are nothing compared with what unites them.

And so what I think—what my aspiration is what you're doing. My aspiration is here and then spreading abroad, you help to maintain here and to build abroad the institutions with the lawyers that can bring in those who communicate, namely the press, in order to achieve that independence of which

Justice O'Connor speaks, all in the interests of furthering the gamble, that by doing so we help to maintain that prosperity that can flow from investment and the human liberty that flows from protection of basic human rights. [*Applause*].

JUSTICE O'CONNOR: That's great. I want to say thank you to all the people who came long distances to participate in this conference and to put your heads together and think what you want to have happen and see is needed. So, many thanks to all of you.

MODERATOR: I have tried to fulfill the role of moderator with moderation, and lack of bias, but here's where I get in trouble. I know my good friend Steve Breyer will forgive me this. He's our circuit justice, too. There is a special person here who has done so much for this country. She has shattered glass ceilings internationally as well. And she's very hard to replace. And I think—as a member of the American Bar Association, I think my association should thank both these justices, but offer Justice O'Connor a standing ovation.

JUSTICE O'CONNOR: Oh, dear! Oh, no! [*Extended Applause*].