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ADDRESS

By Michael Traynor, Esquire
President of The American Law Institute

*The Annual Dinner
of The American Law Institute
was held in the Grand Ballroom
of The Mayflower, Washington, D.C.,
on Tuesday evening, May 20, 2008.
First Vice President and President Designate
Roberta Cooper Ramo presided.*

First Vice President and President Designate Roberta Cooper Ramo:

Good evening. My name is Roberta Ramo and I have the enormous honor of serving as the, I think, least tall Vice President of The American Law Institute, and I welcome you to our Annual Dinner celebrating our 85th year, and I just would like to say how proud I am that we are here in our 85th year and we are all still eating steak, so all very good. (*Applause*)

Let me introduce just a very few special guests, and I hope you will indulge me because I could introduce every single one of you and each of you, including all of our guests, would be extraordinary and it is part of the reason that The American Law Institute is the remarkable place that it is.

But let me start first with my wonderful friend, Shirley Traynor, Mike's wife. Shirley, please stand up. (*Applause*)

I told Shirley, Mike, that I wanted her to sit at my table, but Rod outbid me.

Mike's wonderful daughters, Kathleen DeRose and her husband Frank DeRose, Elizabeth Fowler and Mike's son Thomas Traynor, and also Lucy Millard, who is Mike's wonderful granddaughter, so if you will all please stand up from Mike's family. (*Applause*)

Let me also introduce a great friend of Mike's but someone that has special importance to me, and it is not just because she is a graduate of the University of New Mexico, although that is certainly a good part of why I held her in such high regard. Shirley Hufstedler, who is a great friend of Mike's. (*Applause*)

And for those of you who don't know, she was the first woman on the Council of The American Law Institute. (*Applause*)

The first woman on the Ninth Circuit. (*Applause*)

And a wonderful Secretary of Education. (*Applause*)

So we are very grateful to have her here. Some New Mexico women really know how to do it.

I want to ask our Chair, Rod Perkins, to stand up. Rod, hooray for your many years of leadership. (*Applause*)

Let me introduce also the Chief Justice and President of the Supreme Court of Argentina, who we are so honored to have with us, Ricardo Luis Lorenzetti, Chief Justice. (*Applause*)

And very briefly let me introduce, more about them later, Senator Paul Sarbanes and his wife, Christine. (*Applause*)

As everybody knows, we are in the sad position of having Mike Traynor complete his term as President. All of us in practice know that it is a very lucky thing when you are a lawyer in private practice to have a law firm who is supportive of such work, and I would like to ask Mike's partner, Jim Donato from Cooley Godward to join me. (*Applause*)

I should tell you that Jim is the second partner at Cooley to be President of the San Francisco Bar Association. Mike was the first.

We wanted to say to your firm, Jim, how deeply all of the people in The American Law Institute, but really everybody that's interested in the justice system in America, appreciates not just Mike but what your firm has done, and so we want to present your firm with a certificate, and this is what it says: "[T]he American Law Institute expresses its appreciation to the Cooley firm for its recognition of the importance of the work of the Institute and for the firm's unstinting support of the Institute through the service of Michael Traynor as President of the Institute from July 2000 to May 2008. On behalf of the Institute, this Certificate of Appreciation is signed by Lance Liebman, its Director, and Roberta Cooper Ramo, its First Vice President, for presentation to the law firm on May 20, 2008, during the Institute's 85th Annual Meeting."

Please convey our appreciation to your firm, and I would just like to have you say a few words. (*Applause*)

Mr. James Donato: Thank you so much, Roberta. I have to say I am just thrilled and honored to be here tonight on behalf of Cooley Godward Kronish to accept the Institute's recognition. There are many avenues and forms of pro bono and public service. The mission of this Institute, to improve the law and the administration of justice, is one of the highest forms of that service. It has been the great privilege of Cooley, the extraordinary privilege of Cooley to be able to contribute to the mission of the Institute by supporting our partner, Mike Traynor, as President. We are extraordinarily grateful that we have had the opportunity to make that contribution and to get the Institute's recognition tonight.

I also wanted to say, while I am here, on a personal note how grateful I and the members of my firm are to Mike and how deep our affection is for him, and our appreciation for him is as a colleague in our firm. He joined Cooley in 1963. I won't tell you where I was in 1963, but he (*laughter*) joined Cooley in 1963. In over 40 years of practice at our firm, he has consistently held himself and the people he's worked with to the highest possible legal standards and client service. He has been an incredibly generous mentor to many young lawyers, to me and to other people in this room. He has shown through his personal example what a great privilege it is to give back to our community, give back to our country, through service in organizations like the Institute. It is in that spirit of service that I am very grateful to accept this recognition of Cooley.

Vice President Ramo: Thank you, Jim. (*Applause*)

Vice President Ramo: It is so much fun for me to have a chance to introduce Senator Paul Sarbanes, who will introduce our evening's dinner speaker. Earlier in the day it occurred to me to call a friend of mine from Albuquerque who speaks Greek very well and to ask him what the Greek word for mensch was (*laughter*) because Paul Sarbanes is what we hope for every public servant to be and that is, among other things that I will tell you about, a mensch.

Senator Sarbanes was the longest-serving Senator from Maryland in the history of the state. He was Mike's classmate at Harvard

Law School and has remained his good friend. His kindness to The American Law Institute, through Mike's good offices, has included his speaking to this very same dinner.

Senator Sarbanes graduated from Princeton, was a Rhodes Scholar, and of course attended Harvard Law School with Mike. His life is not the American dream, it is the American ideal. The child of Greek immigrants, he has used the manifest opportunities of our country and his great mind and heart to work for the betterment of us all, and in fact he and his wife have contributed even more to our country in their son, who is now a wonderful member of the House of Representatives. So it is good to know that our country's government is not without a Sarbanes at any moment.

Very few Senators in the history of our country have their names on a single piece of legislation that responded to a national crisis of confidence, in his case the very heart of the structure of our commercial life, and he responded with a practical legislative solution that works and has given corporate shareholders and directors the confidence that the true financial picture of a corporation is being portrayed to them. Sarbanes-Oxley was and is an example of something that has worked. Senator Sarbanes won the Paul H. Douglas Ethics in Government Award for his work, and it is, as always, an honor to have him here, and I ask him to come and introduce our evening speaker. Senator Sarbanes. (*Applause*)

Senator Paul Sarbanes: Roberta, thank you very much for your generous introduction, and thank you to ALI for inviting me to say a few words about Mike Traynor. I realize you are taking a real gamble. Former Senators don't get to a microphone very often, and there is a great danger that when they get the opportunity, they will abuse it. So I am very mindful that I am to be brief this evening, but this is an opportunity I really treasure. Before I turn to Mike, I want to wish Roberta the very best as she assumes her important responsibilities. The ALI is a wise institution, you select your leadership carefully, and I think you have done, once again, an excellent job. Roberta, we wish you all the best. (*Applause*)

I would also like to echo the remarks that were made just a few moments ago about the Cooley law firm and the support they have given Michael over the years, which has enabled so many of the outstanding accomplishments that mark his career. In my view, it reflects an important dimension of what law firms ought to be about. Law firms can be very strong institutions in the workings of our society, particularly by supporting what I call public service in the private sector, a concept we need to keep in mind. So thank you to the Cooley law firm, where Michael has been for over four decades.

That's one of the things that distinguishes Mike Traynor: commitment. Over four decades with the same law firm. Married 52 years to Shirley, a wonderful partner. (*Applause*)

Fifty-one years ago this coming September, Mike and I entered Harvard Law School together. We met early on, and in fact we formed a study group, along with some others, our first year at Harvard. The others dropped by the wayside in subsequent years, but Mike and I kept up our study group, and Michael, thank you very very much for helping me through law school! (*Laughter*) I am prepared to acknowledge it here in front of your colleagues and your family—and I'm delighted to see Kathleen, Frank, Liz, Tom, and Lucy here with us this evening.

As many of you know, just a few years ago, the Ninth Circuit Court, of which Judge Shirley Hufstедler was such a distinguished member, gave Mike the John P. Frank Outstanding Lawyer Award. It was given in recognition of “outstanding character and integrity; dedication to the rule of law; proficiency as a trial and appellate lawyer; success in promoting collegiality among members of the bench and bar; and a lifetime of service to the federal courts of the Ninth Circuit.” I think the Ninth Circuit acted wisely, one might say judiciously, in making that award.

Michael has written a great deal on a number of subjects, but foremost among them are the First Amendment, the legal profession and the rule of law, and the responsibilities of citizenship. All of those writings display a deep commitment to and understanding of the principles embraced in the U.S. Constitution. He really has practiced law

at the very highest level of our profession, in a way that has not only served our own society but has had an international impact as well, and in that regard we are honored that the Chief Justice of Argentina is with us tonight.

Mike Traynor is one of the most decent, fair, and honest people I have ever known. He has an innate sense of justice, a deep and passionate concern to help build a just society, and a rock-ribbed integrity in a time when so many appear to have lost their moral compasses. His impact on the legal profession and our society has been profound. Our friendship, which began in law school in 1957 and has continued for over half a century, has meant so much to me. I am honored tonight to introduce your President and my friend, Mike Traynor.

President Michael Traynor: I'd kind of like to just stand up here and bask in that for a moment.

Thank you, Roberta, Jim, and Paul, for your lovely and heartening words. It is just splendid of you to say those lovely remarks about me and our family, and I am so pleased our family could be here tonight and Shirley Hufstедler came all the way from California.

Roberta brings extraordinary leadership to the Institute. Paul and Christine are dear friends from law-school days, as Paul has mentioned, and Paul is my ideal public servant.

Thank you to the marvelous staff of The American Law Institute; to you, my friends and colleagues; and to my firm. It has been a privilege to work closely with our Director, Lance Liebman, and our Deputy Director, Elena Cappella.

The last eight years have been challenging and rewarding as well as filled with friendship and good humor, for example, our distinguished Nominating Committee Chairman, Gerhard Casper, saying in San Francisco, "I want to emphasize that the Governor of the state and I are the only two people who pronounce California properly. . . ." (*Laughter*) "Though the Governor does it with an Austrian accent, alas";¹ (*laughter*)

¹ 84 A.L.I. PROC. 31-32 (2007).

and, our masterful Vice President Allen Black, saying, “I had a speaker at microphone 1, but he’s either given up or fainted.”² (*Laughter*)

I will miss being your president. And I look forward to 2023, when I can hear a speaker say that in its 100th year The American Law Institute continues to be a prized institution in the life of our country. (*Applause*)

In 1923, our founders’ grand vision was to restate American law in critical areas. The project succeeded. We now are in our third series of Restatements and have published other important work and sponsored conferences to improve the law and the administration of justice in a scholarly and scientific manner.

Will the Institute continue to have the vision of its founders? We are called upon not simply to clarify but also help shape selected frontiers of the law. To realize our full potential, we must identify worthy projects that take less than five years to accomplish (*laughter*) so that we can continue to attract talented Reporters, including those from relevant disciplines in addition to the law. We must be prepared to move promptly and decisively—yet without risking the quality of our work.

In past years, much of this work has been in private law. In future years, the Institute is likely to be called on to address more issues of public law, including criminal law and elections law. Important frontiers, in both law and custom, stand to benefit from the Institute’s scrutiny.

The global implications of our work are increasing. Tonight, in concrete terms, I will discuss two long-time global challenges: liberty and equality. Over 2500 years ago, Heraclitus said that “the major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license.”³ The first sentence of the Universal Declaration of Human Rights reads: “All human beings are born free and equal in dig-

² 83 A.L.I. PROC. 260 (2006).

³ See RUGGERO J. ALDISERT, THE JUDICIAL PROCESS: TEXT, MATERIALS AND CASES 9 (2d ed. 1996) (quoting Heraclitus).

nity and rights.”⁴ But liberty and equality remain inaccessible to billions of people in the world, including people in highly developed countries such as ours.

How can the ALI contribute to the public discourse and attendant formation of opinion and action?

I begin with the ideal of equality. The Supreme Court has created the opportunity for a new dialogue. In her 2003 opinion for the Court in *Grutter v. Bollinger*,⁵ which by a narrow margin approved the use of race as a factor in student admissions by the Michigan Law School, Justice O’Connor predicted: “. . . 25 years from now, the use of racial preferences will no longer be necessary. . . .”⁶ In her concurring opinion, Justice Ginsburg said, “From today’s vantage point, one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”⁷ She also pointed out that “The Court’s observation that race-conscious programs ‘must have a logical end point,’ . . . accords with . . . international understanding”⁸ If we take these two distinguished jurists at their word, the country has only 20 years left to develop a new approach to the struggle that produced *Brown v. Board of Education*⁹ and continues today.

Will our country accept the challenge, or ignore it?

In his book, “The New American Story,” former Senator and Rhodes Scholar Bill Bradley writes: “When the opposition shrinks the playing field, we shouldn’t agree to play on it—we should instead redefine the game.”¹⁰ In our country, the time has come to redefine and en-

⁴ United Nations, Universal Declaration of Human Rights, *available at* <http://www.unhcr.ch/udhr/> (last visited June 4, 2008).

⁵ 539 U.S. 306 (2003).

⁶ *Id.* at 343.

⁷ *Id.* at 346. *But cf.* *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738 (2007) (rejecting student assignment plans that used racial classifications).

⁸ *Id.* at 344.

⁹ 347 U.S. 483 (1954).

¹⁰ BILL BRADLEY, *THE NEW AMERICAN STORY*, 285-286 (2008).

large the conversation about race and equality, to one that encompasses human rights.

Engaging the Institute in a public conversation about civil rights on the larger frontier of human rights is neither a radical notion nor a new one. It builds on ideas initiated over 60 years ago.

In 1945, the Institute made possible the Statement of Essential Human Rights, which contributed to the Universal Declaration and includes the rights to education, employment, adequate food and housing, and health care as well as protection against arbitrary discrimination.¹¹ Contemporaneously, in 1947, the NAACP presented to the UN “An Appeal to the World!”¹² It invoked the language and power of human rights to address racial discrimination. Despite its eloquence and moderation, the appeal was rebuffed. By 1950, the NAACP had decided to limit its focus and struggle to domestic civil and political rights. The story is well told by historians Carol Anderson in her book “Eyes Off the Prize”¹³ and Mary Dudziak in her book “Cold War Civil Rights.”¹⁴

The developing law of human rights, internationally as well as under state constitutions,¹⁵ is not the only source of ideas, but it pro-

¹¹ Statement of Essential Human Rights (1945), drafted by a Committee representing principal cultures of the world, appointed by the American Law Institute, in THE AMERICAN LAW INSTITUTE, SEVENTY-FIFTH ANNIVERSARY, 1923-1998 at 261; see Michael Traynor, *The Statement of Essential Human Rights—A Groundbreaking Venture*, 29 The ALI Reporter Nos. 2 and 3 (2007).

¹² National Association for the Advancement of Colored People, AN APPEAL TO THE WORLD! (1947) (prepared under the editorial supervision of W.E. Burghardt Du Bois).

¹³ CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955 (2003).

¹⁴ MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000). I was privileged to serve with Professors Anderson and Dudziak on a panel at the U.C. Berkeley School of Law Conference on February 29, 2008, commemorating the 60th anniversary of the Universal Declaration of Human Rights and entitled “2048: Drafting the Future of Human Rights,” available at <http://www.draftinghumanrights.berkeley.edu/2008/conference> (last visited June 5, 2008).

¹⁵ See, e.g., *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

vides an enlightened perspective to examine how “civil rights” as we know them could be strengthened by “human rights”; to engage scholars and our members; and to influence public opinion and law.

Justice Ginsburg has suggested both that “Contemporary human rights documents . . . distinguish between policies of oppression and measures designed to accelerate *de facto* equality,”¹⁶ and that “We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups.”¹⁷

What do others tell us about such endeavors?

In March 2008, the UN Committee on the Elimination of Racial Discrimination made two key recommendations to the United States, to reinforce the prohibition of racial discrimination by laws that are discriminatory in effect, although not necessarily in purpose, and to address discrimination by private acts.¹⁸ As we have demonstrated in other recent projects, we have much to learn from our international colleagues.

Much of the new dialogue will be in electronic forums and will relate to both equality and liberty. In addition to the “digital divide”

¹⁶ Gratz v. Bollinger, 539 U.S. 244, 302 (2003) (Ginsburg, J., dissenting); see also David Weissbrodt, *International Human Rights Law Perspective on Grutter and Gratz*, 21 CONST. COMMENT. 275 (2004); Clark D. Cunningham, *After Grutter Things Get Interesting! The American Debate Over Affirmative Action Is Finally Ready for Some Fresh Ideas from Abroad*, 36 CONN. L. REV. 665 (2004).

¹⁷ Ruth Bader Ginsburg and Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999) (Cardozo Memorial Lecture). See also CYNTHIA SOOHOO, CATHERINE ALBISA, and MARTHA F. DAVIS (Eds.), 2 BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS (2008); THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE (2007).

¹⁸ United Nations Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention [the International Convention on the Elimination of All Forms of Racial Discrimination]: Concluding Observations re Reports of the United States of America*. 72d session, Geneva, 18 February – 7 March 2008, available at <http://huachen.org/english/bodies/cerd/docs/co/CERD-C-BEL-CO-15.pdf> (last visited June 5, 2008). The Committee made additional recommendations to the United States. *Id.*

between those with access to the Internet and those without, another critical divide now exists. That divide is between people in freedom-loving nations, which, with rare exception, do not censor or punish speech, and people living under authoritarian regimes, which not only censor speech but also imprison those who speak in impermissible ways or who seek information about prohibited subjects. China and other countries have proved it possible to impose authoritarian controls on the Internet. And, sadly, some companies in the United States have facilitated such controls.¹⁹

The current debate also may be conducted in world-trade terms. For example, the European Parliament recently decided, by a vote of 571 to 38, to treat Internet censorship by national governments as a trade barrier.²⁰ Such an idea, especially if adopted as a European Union law, could influence both trade negotiations and developing trade law. As we continue ALI's own grand project on world-trade-law principles, we should stay attuned to the connections between trade and human rights.

I turn now specifically to the ideal of liberty, especially to the challenge that terrorism presents to both liberty and security.

Among the Institute's great strengths is its nonpartisan approach to the law. We would dilute that strength if we were to take positions either on political issues or without sustained analysis and rigorous scholarship. What do we do? We invite judges, law teachers, and lawyers to become members of ALI and participate actively in our work regardless of their personal or political philosophies. We appreciate the many and varied contributions they make to ALI, to government, and to society. Because of this, ALI's work stands the test of time. We celebrate our ability to resolve differences without regard to partisan politics and in a spirit of friendship and collegiality.

¹⁹ See, e.g., Michael Traynor, Comments as Panelist on *The Politics of the Internet*, at the American Society of International Law on April 10, 2008 (may become available from ASIL or on its website) (audio version is available for purchase from ASIL).

²⁰ Eric Bangeman, *EU may begin treating Net censorship as a trade barrier*, arstechnica, Feb. 27, 2008, available at <http://arstechnica.com/news.ars/post/20080227-eu-may-begin-treating-net-censorship-as-a-trade-barrier.html> (last visited June 6, 2008).

Repression and lawlessness transcend party boundaries. Assaults on liberty have come from past administrations, both Republican and Democratic. President Lincoln suspended the writ of habeas corpus; President Wilson urged Congress to enact the Sedition Act of 1918; and President Roosevelt authorized the internment of U.S. citizens of Japanese ancestry.

I have been careful, without being silent, to distinguish my personal views from those of the Institute. But I cannot be silent as a citizen in the face of what I view as the oppressive, relentless, and lawless attack by our own government on the rule of law and our liberty. (*Applause*) Accordingly, I have publicly addressed the illegality of torture;²¹ the obligations of citizenship in a time of repression;²² judicial independence as a cornerstone of liberty;²³ governmental secrecy; and the assaults by our government on constitutional rights, the Separation of Power, and the Geneva Conventions.²⁴

I speak tonight about the failure of our own government to honor the law. President Eisenhower, in his first inaugural address, called for “the power to discern clearly right from wrong, and allow all our words and actions to be governed thereby, and by the laws of this land. . . . [W]e, the people, elect leaders not to rule but to serve. . . .

²¹ Michael Traynor, Dissenting Statement on Highly Coercive Interrogations Regarding the Harvard Long Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism (2003-2004), available at http://belfercenter.ksg.harvard.edu/files/traynor_letter.pdf (last visited June 6, 2008). See also Michael Traynor, Comments on Web-based Forum Accompanying PBS Frontline, *A Question of Torture*, Oct. 18, 2005, available at <http://www.pbs.org/wgbh/pages/frontline/torture/justify/> (last visited June 6, 2008) and at <http://www.pbs.org/wgbh/pages/frontline/torture/justify/2.html> (last visited June 6, 2008); Michael Traynor, In Response: *The Ticking Bomb Contention*, BULL. AM. ACAD. 41 (Winter 2005), available at <http://www.amacad.org/publications/bulletin/winter2005/response.pdf> (last visited June 6, 2008).

²² Michael Traynor, *Citizenship in a Time of Repression*, 2005 WIS. L. REV. 1 (Fairchild Lecture).

²³ Michael Traynor, *Judicial Independence: A Cornerstone of Liberty*, 37 GOLDEN GATE U. L. REV. 487 (2007).

²⁴ Michael Traynor, Commencement Address, University of South Carolina School of Law (May 11, 2007).

[Our enemies] feed upon the hunger of others. Whatever defies them, they torture, especially the truth. . . . [W]e Americans know and we observe the difference between world leadership and imperialism; between firmness and truculence; between a thoughtfully calculated goal and spasmodic reaction to the stimulus of emergencies.”²⁵

I expect that many leaders and citizens, regardless of political affiliation, would agree that the rule of law is compromised and these values are subverted:

- when a government tortures and cruelly and inhumanly degrades its captives, as at Guantánamo, Afghanistan, and Abu Ghraib; this outrageous behavior did not “trickle up” from unauthorized conduct by a few privates, corporals, and sergeants but instead was authorized, defended, and encouraged at the highest levels of our government, justified by lawyers, including especially the Office of Legal Counsel, in secret memoranda, and approved by the then Secretary of Defense;²⁶
- when our government engages in extraordinary rendition of captives to foreign countries for even more grotesque interrogation;

²⁵ Dwight D. Eisenhower, Inaugural Address (Jan. 20, 1953) *available at* <http://www.bartleby.com/124/pres54.html> (last visited June 6, 2008).

²⁶ *See, e.g.*, Office of Legal Counsel (John Yoo), Memorandum for William J. Haynes II, General Counsel of the Department of Defense, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, *available at* http://gulcfac.typepad.com/georgetown_university_law/files/march.14.memo.part.1.pdf (last visited June 6, 2008) (previously classified and unavailable to the public until 2008). *See also* PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008) (*passim*); PHILIP GOUREVITCH AND ERROL MORRIS, *STANDARD OPERATING PROCEDURE 29-32, 48-51* (2008); FREDERICK A. O. SCHWARZ & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR*, 65-123 (2007); KAREN J. GREENBERG & JOSHUA L. DRATEL, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (2005) (*passim*), MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004) (*passim*); SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* (2004) (*passim*); Michael Traynor, *Citizenship in A Time of Repression*, 2005 WIS. L. REV. 1, 4-6 and nn.17, 18 (2005). In January 2007, I visited Guantánamo as the guest of the DOD’s General Counsel and observed a new and able team administering a flawed policy at a place that should be closed.

- when our President undermines an amendment against torture by a signing statement that, as Commander in Chief, he can ignore statutory mandates;
- when the government detains people indefinitely and seeks to deny them habeas corpus and judicial review;²⁷
- when the government engages in warrantless and extensive surveillance of U.S. persons in violation of the Foreign Intelligence Surveillance Act; and
- when the government fails to support our dedicated troops with sufficient armor and equipment, when it lacks an intelligent plan for bringing them home with honor, and when it fails to provide caring, competent, and sustained medical attention for the wounded.

With a President lacking in executive restraint, the other two branches, Congress and the judiciary, are challenged either to check him or her and keep our system in balance or to acquiesce. Acquiescence by one branch increases the pressure on the other. Unfortunately, during the critical years after 9/11, Congress did not stand up to the President, and many of its members, on both sides, accommodated or even applauded him. There were significant exceptions, including Paul Sarbanes, but, on the whole, both Congress and the American public were uninformed, fearful, and unengaged; and they let themselves be deceived. And the media fell down on the job. Despite a few notable exceptions, journalists too often fail to ask the tough, probing questions that we, as citizens, need them to ask.

In addition to its repression of liberty, our current government has distorted the English language and cloaked its actions in secrecy. The word “Patriot” names a statute that stifles liberty. So-called “Na-

²⁷ On June 12, 2008, approximately three weeks after these remarks were made, the Supreme Court handed down its decision in *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229 (2008). The Court, in an opinion by Justice Kennedy, rejected the government’s contentions that its prisoners at Guantánamo, including those who are not U.S. citizens, could not seek judicial review and habeas corpus.

tional Security Letters” and attendant gag orders play havoc with the very foundation of our democracy.²⁸ Waterboarding and other forms of torture are called “enhanced interrogation techniques,”²⁹ or, in the Vice President’s words, a “dunk in the water.”³⁰ Ethnic and religious violence and the resulting devastation are labeled the “birth pangs of a new Middle East.”³¹ Stonewalling and high-level cover-ups are substituted for honest reports, as in the cases of Pat Tillman and Jessica Lynch. Secrecy and lies are antithetical to democracy. As the U.S. Court of Appeals for the Sixth Circuit stated in holding secret deportation hearings unconstitutional, “[a] government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution.”³²

This is a sad state of affairs—which an engaged citizenry must address. It is the particular responsibility of lawyers to be champions of the Constitution and the laws of our land. But it is time for all Americans to stand up and speak out. Finally, that is beginning to happen.

²⁸ See *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007) (Marrero, J.), also available at <http://www.aclu.org/safefree/nationalsecurityletters/31565lg120070906.html> (last visited June 6, 2008); Jay M. Zitter, *Constitutionality of National Security Letters Issued Pursuant to 18 U.S.C.A. § 2709*, 25 A.L.R. Fed. 2d 547 (2008).

²⁹ See, e.g., Brian Ross & Richard Esposito, *CLA’s Harsh Interrogation Techniques Described*, ABC News, Nov. 18, 2005 (quoting what “CIA sources described [as] a list of six ‘Enhanced Interrogation Techniques’ instituted in mid-March 2002 and used, they said, on a dozen top al Qaeda targets incarcerated in isolation at secret locations . . .” and including waterboarding), available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866> (last visited June 6, 2008).

³⁰ See Dan Eggen, *Cheney’s Remarks Fuel Torture Debate*, The Washington Post, Oct. 27, 2006, p. A09, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/26/AR2006102601521.html> (last visited June 6, 2008), quoted in PHILIPPE SANDS, *TORTURE TEAM*, *supra* note 26, at 4.

³¹ See David Bromwich, *Euphemism and American Violence*, 55 NY REVIEW OF BOOKS NO. 5 (April 3, 2008) available at <http://www.nybooks.com/articles/21199> (last visited June 6, 2008), quoting Secretary of State Condoleezza Rice’s statement on July 21, 2006, Bromwich states: “The frightening thing about such acts of renaming or euphemism . . . is their power to efface the memory of actual cruelties. Behind the façade of a history falsified by language, the painful particulars of war are lost.” *Id.*

³² *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710 (6th Cir. 2002); *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 221 (3d Cir. 2002) (Scirica, J., dissenting).

We Americans are a self-reliant and resilient people. We do not need to be coddled or protected from unpleasant information through governmental euphemism and secrecy. We can be told the truth about what the Government knows and does not know in a forthright way that does not compromise secret intelligence or military operations. In an advanced and enlightened democracy, the people deserve no less.

In his famous speech to new citizens entitled *The Spirit of Liberty*, Judge Learned Hand said: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."³³

Over 50 years ago, when I was in military service, our country was emerging from the McCarthy Era, and we faced the real and imagined threats of communism and a Soviet regime that had executed millions of people and enslaved millions of others in hard labor. With reference to Judge Hand's haunting words, my father, Roger Traynor, remarked in a speech: "The judges whose job it is to apply [the Constitution] must carry liberty in their hearts even when other men have ceased to. Who is to say that liberty is dead in the hearts of men who are silent? Liberty is not lost suddenly, catastrophically; it is lost imperceptibly, by erosion. Who is to say it is irretrievably lost until it has died in the hearts of those whose job it was to care that it lived in the hearts of others?"³⁴

It would be good to be able to count on judges who, like Justice Robert Jackson in the Second Flag Salute case, wrote: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."³⁵ I am proud to say we have such judges in this room tonight.

³³ LEARNED HAND AND THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 144 (2d ed. 1953).

³⁴ Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L. REV. 230, 241 (1956).

³⁵ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

The House of Lords Appellate Committee recently decided that Parliament's indefinite detention law violated the Human Rights Act.³⁶ The strong opinions included one by Lord Hoffmann. He stated that the power to detain people indefinitely without charge or trial could not be justified unless the life of the nation were threatened; that the United Kingdom was "a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life"; and that "[t]he 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."³⁷

Suppose, however, the day were to come when judges lose heart, when restraint becomes timidity and timidity complicity, and when we cannot count on either judges or legislators to protect our liberty, particularly against an executive branch that represses it. Now is the time to educate and engage ourselves and our fellow citizens.

The term "citizen" connotes active membership in our civil community. As Justice Louis Brandeis wrote, "the greatest menace to freedom is an inert people; . . . public discussion is a political duty; and . . . this should be a fundamental principle of the American government."³⁸ It is our responsibility as citizens and lawyers to safeguard our civil liberties, to demand the truth, and to stand up against the erosion of our liberties. Indeed, as President Theodore Roosevelt said during World War I, the notion that "there must be no criticism of the President, or that we are to stand by the President, right or wrong, is not only unpatriotic and servile, but is morally treasonable to the American public."³⁹ (*Applause*)

³⁶ A (FC) v. Secretary of State for the Home Dep't, [2004] UKHL 56 (2004).

³⁷ *Id.* at paras. 96, 97 (opinion of Lord Hoffmann).

³⁸ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

³⁹ Theodore Roosevelt, Editorial, *Kan. City Star* (May 7, 1918), available at <http://www.theodoreroosevelt.org/life/quotes.htm> (last visited June 6, 2008); see also CICERO, *DE OFFICIIS* §III, 6, 299 (Walter Miller Trans., Harv. U. Press 1985) ("We have no ties of fellowship with a tyrant, but rather the bitterest feud.").

The subjects of liberty and equality present a grand opportunity as well as a great challenge for our country and our Institute. Our government's torture of captives and other lawless acts have debased our country's reputation. Such debasement is akin to that resulting from the racial segregation, lynchings, and brutality that preceded our advances in civil rights. We will survive the depreciation of the dollar but what sort of survival would it be if we continue to debase our moral currency? In earlier years, our country's adherence to the rule of law was a cause for hope for people, as well as an inspiration to judges, not just in America but in many other countries.⁴⁰ If that faith evaporates, injustice will increase—and the repercussions will be global. As Martin Luther King wrote in *Letter from Birmingham Jail*, "Injustice anywhere is a threat to justice everywhere. We are . . . tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."⁴¹

Before the Berlin Wall fell, with the consequent opening of Eastern Europe, I was not optimistic that such an event would occur in my

⁴⁰ Cf. *Khadr v. Canada (Justice)*, 2008 SCC 28, available at <http://scc.lexum.umontreal.ca/en/2008/2008scc28/2008scc28.html> (last visited June 6, 2008). The Supreme Court of Canada, citing, e.g., *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) and The Geneva Conventions, concluded that "Mr. Khadr is entitled to disclosure from the appellants of the records of the interviews and of information given to U.S. authorities as a direct consequence of conducting the interviews. The principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law, do not extend to participation in processes that violate Canada's international human rights obligations," (para. 2). "With the benefit of a full factual record, the United States Supreme Court held that the [Guantánamo] detainees had illegally been denied access to *habeas corpus* and that the procedures under which they were to be prosecuted violated the *Geneva Conventions*." (para. 21). "The violations of human rights identified by the United States Supreme Court are sufficient to permit us to conclude that the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental human rights protected by international law" (para. 24). "The effect of the United States Supreme Court's holdings is that the conditions under which Mr. Khadr was held and was liable for prosecution were illegal under both U.S. and international law at the time Canadian officials interviewed Mr. Khadr and gave the information to U.S. authorities. Hence no question of deference to foreign law arises." (para. 26).

⁴¹ Martin Luther King, Jr., *Letter from Birmingham Jail*, April 16, 1963, available at <http://www.stanford.edu/group/King/frequentdocs/birmingham.pdf> (last visited June 6, 2008).

lifetime. Can we hope for another advance that will link the ending of impoverishment for many to the beginning of liberty and equality for all? Although we cannot expect the courts in specific cases to create systematic progress, we can expect them to implement it and enforce the law. We ought to be able to expect Congress and legislative bodies to come together to address the pressing issues of the day and improve the lives of ordinary Americans. We lawyers can take the lead in shaping the public discussion, forming the opinions, and stating the coherent principles that will lead to progress, to effective enforcement by the courts of existing laws and constitutional guarantees, and, when necessary, to enactment of new laws.

We can take heart, for example, from principles such as those adopted at the Global Judges Symposium that preceded the Johannesburg environmental summit in 2002. The judges urged the judiciary “to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization”⁴² The Institute, if it wishes, could help foster principles of comparable power to advance human rights, especially the rights to liberty and to equality. (*Applause*)

As to both liberty and equality, new laws may be needed but they are not the only answer. New approaches to old laws together with stronger enforcement are also needed. Sometimes the custom that eventuates from an educated public opinion is preferable to a rule, because it governs by the moral force of widespread acceptance. Public discourse that led to disinvestment helped end apartheid.⁴³ A custom of insisting on liberty and justice for all, not just routinely displaying or pledging allegiance to our flag, could make it unacceptable for a legislator or other official to suspend habeas corpus, condone torture,

⁴² Global Judges Symposium, available at <http://www.dfa.gov.za/docs/2002/wssd0828a.htm> (last visited June 6, 2008); see Michael Traynor, *On Environmental Law*, DAEDALUS 116 (Summer 2003).

⁴³ See, e.g., Nelson Mandela, Address to the Parliament of Canada, 18 June 1990, available at <http://www.anc.org.za/ancdocs/history/mandela/1990/sp900618.html> (last visited June 6, 2008).

or undermine judicial independence. Such a custom can withstand legalistic challenges, clever efforts to create exceptions, and pretenses at compliance, and it relies not on sometimes cumbersome enforcement mechanisms but on individual and collective responsibility. It also holds the promise of uniting us as one nation, indivisible.

Earlier tonight, I mentioned Gerhard's and our Governor's pronouncement of "California." As a Cal Berkeley graduate, I am now going to dare to say our rival Stanford's motto,⁴⁴ which is in German:

"Die Luft der Freiheit weht"

"The wind of freedom blows."

Law is a demanding profession. Yet it affords the opportunity to give back to the profession and the community through pro bono work. Each of us has a chance to help build and maintain the system of justice that is a vital element of a free country. We have been trained to know and uphold our Constitution and our laws. We can and must show courage in the defense of our liberty. Our liberty and our values are our best defense, as well as our best weapon against terror. In strengthening them, we can also advance the cause of human rights and regain the respect and admiration of our fellow world citizens.

If there is a way our Institute can help our country make such progress, we will have earned the right to say in 2023, "Yes, we have matched the stature and vision of our founders and we can justly celebrate our centennial."

I look forward to the continuing freedom, as long as I still have it, of being and acting as a citizen. I step down as your president with all good wishes and my heartfelt thanks to Roberta, to Lance, and to each of you for eight exciting and enjoyable years. Thank you very much. (*Applause*)

Vice President Ramo: What we have heard tonight, Mike, are the remarks of a true American patriot, and I think I know what the word means.

⁴⁴ See Stanford University, available at <http://www.stanford.edu/home/stanford/facts/founding.html> (last visited June 6, 2008).

Now it is my pleasure, Mike, to say a few words about you. First let me say that for those many of you who have said to me, “How can you fill Michael Traynor’s shoes?” I can’t. Even two feet in one shoe would not work out so well for me. In fact, I was thinking as Rod stood up, I think we’re going in a bad order, Mike, in terms of the physical stature of our Presidents.

But it is, I think, a mark of your stature in the legal community, Mike, that I have been inundated with e-mails, telephone calls, early this morning a fax under my door, pulled aside at this Meeting to make sure that I knew how deeply important your presidency has been, not just to The American Law Institute but to the American legal community as a whole, and that they wanted to make sure that I expressed on their behalf how important a person you are to us.

Some of you may not know that Mike took office in the most difficult way eight years ago, when Charlie Wright died unexpectedly. As you now know from knowing him, he put away everything else in his life that he was doing, with no complaint, to become our leader. His very great mind has wide-ranging interests. He is a first-rate advocate, not only for his clients, but for the environment, for the justice system, for The American Law Institute, and, as you heard tonight, for our democracy.

During Mike’s tenure, we have finished and also begun some of the most important work of our Institute’s history. He has encouraged us both to assume appropriate responsibility in the international community, when asked, and to make sure that we understood that there was a great world outside our country from which we should draw ideas and colleagues.

In our work, he has been a constant presence in virtually every project, including that of ensuring that The American Law Institute itself strove hard to meet the goals of diversity that mirrored the great diversity of our country. His deft leadership allowed us to remake our governance into a model that at the same time met far more than the best practices for institutions and kept our hallmarks—quality, civility, and the collegiality of our deliberations—something that so many of

you have commented about that it makes me thrilled that we have it in our room here and sad that some of you think we have lost it in American life, but I think, Mike, in your honor we will strive to get it back.

But perhaps your most important contribution will not show in citations or in any chart marking the numbers of accomplishments at The American Law Institute during your leadership. I think maybe your most important contribution to our work and that of our democracy is that you are an icon of what an American lawyer is supposed to be: greatly intelligent, courageous, hardworking, vastly kind and patient, a person who sees the values of others not by what they look like but by what they do, somebody who values his family, his colleagues, and his friends, and a man whose ready laugh defuses any difficult situation. Mike, you are the person we all wish we could be. (*Applause*)

So how do we really thank somebody who has given us the gift of his leadership and concern? It's easy. I knew exactly what to do. I called his wife. (*Laughter*)

And, having hung around with Bill Webster for a long time, I knew how to call her when you weren't there. (*Laughter*)

The Council wanted to give you a very special gift, Mike, and of course Shirley immediately said, because you are such a modest person, "No, no, no, no, don't do anything, he will just be thrilled, he doesn't want a present of any kind," and it was only when I told her that the only thing I had been able to think of giving you was a really big rodeo buckle with ALI on it (*laughter*) that she finally suggested something that she thought you might want.

Before I ask our wonderful helpers behind the curtain to bring it out, I want to tell you that when I sent an e-mail around to the Council indicating what we had all agreed might be something you would like, the Council was so incredibly generous, because in many ways we met Shirley's requirements, that I want to announce tonight that on behalf of the Council we are making a \$5000 gift to the Griswold endowment in your name. (*Applause*)

And now a personal gift for you from the Council. Who knew with all this that Mike Traynor and Woody Allen shared something in common? They both play the clarinet (*laughter*) and so, Mike, we have had made for you a handmade wooden music stand, which they tell me will grow very tall, and it says on it: “With deep thanks to Michael Traynor from The American Law Institute.” So please. (*Applause*)

President Traynor: Thank you so much.

Vice President Ramo: Thank you. And now, because I know that the President and the Chair will require it, it is getting close to 10:00. It’s time to go to bed, to read those parts of the Restatement of Employment Law that you have not read, and we will see you all at 9:00 o’clock sharp. Thank you and good night. (*Applause*)