

President Ramo: Well, good morning. This has been quite an extraordinary Meeting and we are starting off this morning in an extraordinary way. First of all, we rarely have surprises at The American Law Institute at our Meetings, in our program, but today we have an actual surprise because we had not announced, until this morning, who was going to be awarded the Henry J. Friendly Medal.

Let me first, before I say that, say that we are thrilled to have so many Friendly clerks with us, and I would just like to say welcome to all of you. *(Applause)*

I was thinking this morning when I got up, I cannot imagine all of the jokes that have been endured by being a Friendly clerk, *(laughter)* I mean just a lot, and in fact, most of the clerks I have ever encountered were not that friendly to me, but so we will just move right on.

So let me announce that the Friendly Medal has been awarded by the Council of The American Law Institute this year to Judge Pierre Leval and Judge Michael Boudin. *(Applause)*

And let me invite into this very merry band of scholars, judges, and practicing lawyers like me, to present the Friendly Medal, the Chief Justice of the United States, John Roberts, who is very friendly, too, and Judge Pierre Leval. Michael could not be with us today, but we will, of course, send him a record of the proceedings and his wonderful medal.

Ladies and gentlemen, the Chief Justice of the United States. I hope.

(Chief Justice Roberts received a standing ovation.)

And to introduce the Chief Justice, someone well known to us, our Director, Lance Liebman.

Director Liebman: The Friendly Medal, of course, honors someone who is a great, great judge but also a great leader of this organization, The American Law Institute, and tremendously devoted to this organization. It is a medal that is given not every year but only

when there is somebody available who seems like they have earned it, or in this case two people who have definitely earned it, and it has been given to a number of very distinguished people in the American world of law.

Let me just say very briefly, the introduction I am doing, that you do feel old when you taught property law to the Chief Justice of the United States. (*Laughter*) And it has been of great value to him, because he was fully prepared in his confirmation hearing for any questions about the rule against perpetuities (*laughter*) or covenants running with the land, so much so I think the Senators knew who had taught him, so they did not even bother to ask any questions about that. (*Laughter*)

To be slightly serious for a paragraph, you know the line “we stand on the shoulders of giants,” and we also then try very hard to be strong enough to support, on our shoulders, people who will be future giants. And that is a way to think, I was thinking about this in the middle of the night, a way to think about the relationship to law clerks and between law clerks and judges. The law clerks are often very outstanding people coming out of law school, they learn a tremendous amount in the clerkship, they then move into the legal profession, and the list of the 51 Friendly clerks that is at the back of David Dorsen’s biography of Judge Friendly [DAVID M. DORSEN, HENRY FRIENDLY, GREATEST JUDGE OF HIS ERA (2012)], which some of you should read, is an amazing list of where those people are now, and what they have done, and the judges they have become, and etc., etc. The Chief Justice was a clerk for Judge Friendly, so it could not be better than for him to present the medal to Michael and Pierre.

I will finish with one quick story, and this is the last one of the thousand, Mr. Chief Justice, that these people have had to endure my telling in my 15 years in this job. But some of you met last night our two kids, who are 45 and 47 years old and nice enough to come down for the dinner last night, and it reminded me that when they were something like six and eight or five and seven, something like that, we brought them as tourists to Washington. We looked at the Lincoln Memorial, whatever we did, and then we went over to the Supreme

Court, where I had been a law clerk for Justice White, and of course the Justice was nice enough to meet with them for at least five minutes or whatever and it was a great experience.

Then we came out—and of course the front door you could use in those days—and came down the grand stairs and were standing there out on the street, and our older son, Jeff, said, “On the shelf in Justice White’s office, there was a football. Why was that, Daddy?” (*Laughter*) And I said, “Well, he led the National Football League in ground gaining, while he was a full-time student at Yale Law School, flying to the games on Fridays,” and, you know, whatever, “and an All-American,” whatever, and I go through this stuff, and Jeff says, “I should have gotten his autograph.” (*Laughter*)

Mr. Chief Justice. (*Applause*)

Chief Justice of the United States John G. Roberts, Jr.: Thank you. (*Applause*)

Thank you very much. This is a wonderful opportunity for me to publicly thank Professor Liebman for something that I suspect he does not even remember. It was about this time of the year, my third year in law school, that I learned there was something called a third-year paper requirement (*laughter*) at the school and that this required a faculty sponsor. Now the law school was a much less personal place back then than I am sure it is now, (*laughter*) but I did not have many options to choose from in selecting a faculty sponsor with about 10 days to go before the paper was due, but I was told that Professor Liebman was a soft touch on things like this and he turned out to be.

Director Liebman: Absolutely. (*Laughter*)

Chief Justice Roberts: So but for him I am pretty confident I would not be here today. (*Laughter*) (*Applause*)

Thank you very much to the ALI for inviting me to present the Friendly Medal. I have been a member of your organization since 1990. My record of attendance has not been good, but the Institute is, as you know, dedicated to clarifying and improving the law, and I think I have done my part for the Institute over the past several years.

It has been in the nature of what I remember being called, when I was at the law firm, business development. (*Laughter*) My colleagues and I have been doing a very good job of ensuring that the Institute would have many opportunities to clarify. (*Laughter*)

I was privileged very much to be a law clerk to Judge Friendly, and finishing up the third year of law school the schedule was such that he asked me to begin in the fall and that was fine, so I took a job at a law firm in New York for the few months before the clerkship would start. Two days before my graduation, I got a call from the judge saying the schedules had been changed and he would like me to begin on Monday.

Now this put me in kind of a pickle. I said, “Well, I am sure I will, but I have committed to this law firm to work for them over the summer.” There was something a little bit of a chuckle on the other end of the line, and he said, “Law firms in this town are used to having me change their plans.” (*Laughter*) And I began the next Monday, and the law firm survived without my services. (*Laughter*)

The Institute has chosen well. The recipients, Judges Mike Boudin and Pierre Leval, are extremely worthy honorees. I have known each of them for 35 years, and I can attest to that personally. They embody the judge’s uncompromising rigor and integrity in following the law wherever it may lead. No one today is remotely like him. No one has been remotely like Judge Friendly since he passed, and no one will be like him again in our profession.

Consider what he was. He was the greatest judge of his era, which is the subtitle of the new biography out about him, and I think there is no disputing that. But he was also a leading scholar and writer and thinker in law. His law-review writings and his speeches are still looked to today and still widely cited.

Specialists in different areas of the law compete to claim him as their own. Securities lawyers will tell you that was his forte, securities law. Those who practice administrative law will say that was his first love. People whose work involves them in questions of federal jurisdiction will say surely that was top on his list. Even practitioners of

railroad law would say, no, no, that was his favorite subject, a subject he learned as presiding judge on the Special Railroad Reorganization Court. Working on the Second Circuit was simply not enough judging for his tastes. Even criminal lawyers will point to his very influential articles on criminal procedure and say that surely was where he was at his best.

And then there are his contributions to the ALI as part of his scholarly record. I am going to read just very briefly what was in the proposal submitted to the members of the ALI when this medal was first suggested. They said, “[A]part from the Institute’s directors, no member since Learned Hand has made more of a contribution than Judge Friendly to the Institute’s own projects.” Being an ALI proposal, there is a footnote, and the footnote says, (*laughter*) “Judge Friendly was an adviser for the Study of [the] Division of Jurisdiction Between State and Federal Courts; Model Code of Pre-Arrest Procedure; Federal Securities Code and Corporate Governance Project.”

So he was the greatest judge of his era, he was a leading scholar, and he was a lion at the bar, a great practitioner in New York, cofounder of one of New York’s great law firms. On top of that, he was a prominent member of the business community, general counsel to Pan Am, member of its board at a time where the air-transportation industry was just forming the rules and guidelines that would govern that industry, and he played an extraordinary part in that. No one is like that today. I mean, who would you say was the greatest judge, a leading scholar, a prominent practitioner, a business person? No one is like that at all today.

But there was no one like that then, if you think back on it, and there certainly will be no one like that in the future, not only because there is no Judge Friendly coming down the pike, but our profession has changed so much that the idea of anyone, no matter how talented, being able to fill all those different roles is just not in the cards.

Despite all of this, Judge Friendly was one of the most unassuming people that you could meet. I think it was Judge Posner who said,

“Henry Friendly was the only one who was not impressed by Henry Friendly.” (*Laughter*)

And you would see this so many times as his law clerk. We would look at his official correspondence when it came in and look at what came out, and I remember a letter coming in offering him an award and the opportunity to deliver one of the very prominent lectures in the legal community at the time, and he wrote back a short reply expressing appreciation but saying that he had to decline because it turns out he had nothing worthwhile to say. (*Laughter*) That, of course, would not have been remotely true then.

I am not sure, frankly, if Judge Friendly would be pleased to have an award named after him, because he was so unassuming, but I do know that if there was going to be such an award, he would be delighted to have it presented to Michael Boudin and Pierre Leval.

I asked for the letter that the law clerks sent to the ALI proposing this memorial for the judge, and it was dug up from the archives. It was sent by a very small subcommittee of the judges’ clerks. Bruce Ackerman was on it, Ruth Wedgwood, and I don’t mean to suggest there is anything fishy about this, but Pierre Leval and Michael Boudin (*laughter*) were also on the subcommittee that was proposing this award. Now it was in 1986, so it was not as if they were just checking their own résumé and making sure things lined up, but this is what they said.

They said the recipient could be a distinguished judge. Okay, Michael Boudin, check; Pierre Leval, check.

An academic. Michael Boudin on the Harvard faculty, check; Pierre Leval, frequent teacher at NYU, check.

A government official. Michael Boudin, the deputy assistant attorney general for antitrust, check; Pierre Leval, assistant U.S. attorney, chief of the appellate section, and later in the New York County District Attorney’s Office, check.

Or a practicing lawyer. Michael Boudin, a famed administrative practitioner here in Washington, Pierre Leval in New York.

Now, both in his academic work and his practice, Pierre, of course, is perhaps most famous for his contributions to intellectual property and in particular copyright.

Now my Court issued a copyright decision on Monday. Pierre, if you have read it, I hope you do not like it. I joined Justice Breyer's dissent, along with Justice Kennedy, so if it turns out you do not like it, you should feel good about that. (*Laughter*)

So, practicing lawyers: Boudin, check; and Leval, check.

The letter signed by Michael Boudin concluded this way: The clerks feel "that it is important to reserve the award for those who can be described as truly distinguished in the tradition of Judge Friendly and the Institute."

Michael Boudin, check; and Pierre Leval, check.

I am delighted to be able to present the Friendly Medal to Michael Boudin in absentia and to Pierre Leval, because I know that that is what Judge Friendly would have wanted. Thank you. (*Applause*)

Judge Pierre N. Leval: Didn't the letter go on to suggest names? (*Laughter*)

This is overwhelming in every detail. It is overwhelming to receive this award from the hand of Chief Justice Roberts. Thank you so much.

Overwhelming to receive this award from The American Law Institute, which has contributed so vastly to American law. During these last days, it has been so impressive to observe once again the way intense debates are conducted here with such intelligence and civility. It is really extraordinary. What a wonderful organization this is, and what extraordinary, inspiring leadership we have in Roberta and Lance.

It is also wonderful to receive this award jointly with my dear friend Mike Boudin, who so exemplifies the judicial virtues of the great HJF. Michael was far and away, universally accounted to be the judge's best and favorite law clerk. Michael is sad that he could not be here

today, but he asked me to speak also on his behalf, and we consulted together as to what would be said.

Finally and most important, to be honored in the name of Henry Friendly—you cannot imagine what that means to both Michael and me.

President Ramo told me that the younger members of our Institute, and that means those under 60, (*laughter*) no longer remember much about Friendly, or know why the ALI so reveres him.

So what about that? Why does the ALI hold the name Friendly in exaltation? The Chief Justice has already told you a bit about the judge, and I am going to tell you some more.

First, to give you a sense of how Henry Friendly was regarded in his time, I am going to quote from what purple-robed eminences of American law said about him.

Judge Posner called him “the most powerful legal reasoner in American legal history.” [Richard Posner, *Foreword* to DAVID M. DORSEN, HENRY FRIENDLY, GREATEST JUDGE OF HIS ERA, at xiii (2012).]

Herb Wechsler, who guided the ALI for decades and was not given to scattering praise with reckless abandon, (*laughter*) wrote, “Only the genius that Henry Friendly was could produce scholarly material of this quality and volume. . . . [N]one of us . . . will see . . . his like again.” [Herbert Wechsler, Remarks at the Extraordinary Session of the Court of Appeals for the Second Circuit in Memoriam of Judge Henry J. Friendly, at 20-21 (1986) (transcript available in 805 F.2d LXXXI).]

For Justice [Felix] Frankfurter, he was “the best judge . . . on the American scene.” [Paul Freund, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1715, 1720 (1986).]

Justice Brandeis, in 1928, complained to then Professor Frankfurter, who had sent Friendly to be the Justice’s law clerk, “Don’t you ever send me another such man as Friendly. . . . I would not have to do a lick of work myself.” [Thurgood Marshall, Remarks at the

Extraordinary Session of the Court of Appeals for the Second Circuit in Memoriam of Judge Henry J. Friendly, at 7 (1986) (transcript available in 805 F.2d LXXXI.)] (*Laughter*)

Thurgood Marshall, quoting from the celebrated Second Circuit rule that one should, “Quote Learned, but follow Gus,” (*laughter*) said that the rule for me will always be, “Quote Friendly, and follow Friendly.” [Id. at 8.] (*Laughter*)

And the recent biography, as the Chief Justice told you, by David Dorsen, labeled him the greatest judge of his time.

So, why such superlatives? I think the answer to that question is not complicated. Friendly knew and understood and explained law better than anyone. In every area on which he wrote, his were the seminal and clarifying opinions, powerfully reasoned, balanced, and wise. At the business and art of judging, he was, quite simply, the best there was.

To those of us who had the privilege of clerking for him—(A number of them are here today; it is wonderful to have them here to celebrate the great judge.)—his genius was all the more astonishing because we saw, as no one else could, the ease and speed with which he produced these extraordinary opinions.

The power of Friendly’s mind was simply prodigious. It was on a different order of magnitude than we encounter among even our most gifted colleagues. He carried virtually all of law in his head. He simply knew it all. It was there.

What is more, in his head he saw clearly the junctions, overlaps, disputed territories, and uneasy interactions among the snakes’ nests of rules that make up the not-so-seamless web.

And his mind worked with the speed of computer circuitry, that is, the speed of computer circuitry on a computer’s good day. (*Laughter*)

When it came to writing an opinion, Friendly would sit down at the table surrounded by the briefs and appendices. He had read these rapidly and he knew them cold. He would sit down and start to

write longhand on a pad, writing at approximately the same speed as if he were copying a previously written text. That is exactly what he was doing, because the entire opinion, from the first moment that he thought about it, was planned, laid out, organized, and written in his head, and merely needed to be committed to paper.

He often quoted priceless gems from the opinions of Learned Hand. To do that, he would get up, walk over to the shelf, and grab the right volume. He knew the volume number and the page. Indeed, the whole expedition of going over to grab the book was unnecessary. (*Laughter*) He could have written Hand's words from memory, leaving at most tiny punctuation corrections to be made by the clerk. In this fashion, he regularly produced, as a rapidly written first draft, perfect final opinions. It often took scarcely more than an hour or two.

For most of these opinions, the clerk had practically no role, apart from adding a few certs denied. In most cases, there were no significant changes to suggest. Friendly rarely needed research on any point because he had it all in his head. The clerk's only significant contribution during the year of clerkship was occasionally—very occasionally—to challenge some aspect of Friendly's analysis and reasoning. When the clerk had the insight and the courage to bring up the point to that rather gruff judge, Friendly instantly understood all the implications of the critique, and he instantly knew whether he loved the suggestion or had no use for it. In the latter case, you would hear something like, (*unintelligible*). (*Laughter*) The subject was closed. I heard quite a few of those during my year of clerkship and, as you can see, my memory of them remains vivid. (*Laughter*)

On the other hand, when the suggestion was one that he liked, it gave him immense pleasure. He instantly adopted it and he glowed with a ruddy joy—something one did not see every day of the clerkship.

Friendly's extraordinary opinions were only the start. As Herb Wechsler said, he also produced an astonishing body of penetrating scholarly analysis on a huge range of subjects. He was deeply committed to important projects of legislative reform, and as a diligent, always

perfectly prepared member of the Council, he contributed hugely to the work of this Institute.

Nor was Friendly a one-note law bore. He was a vastly cultured intellectual omnivore. He had read all of history, ancient and modern, all of the classics of literature and philosophy. He taught himself French so that he could read Proust properly. He knew and loved classical music. He had traveled much of the world.

I remember that, once during my clerkship, he commented casually that he didn't have much use for Xenophon, and then he looked at me as if waiting for my response as to what (*laughter*) I thought of Xenophon. Well, he needed to wait another year for a law clerk—that was Mike Boudin—who could engage with him on Xenophon, Aristotle, Macaulay, Nietzsche, whatever.

So why has the memory of this greatest of judges dimmed? And the answer to that question is, I think, a little more elusive. One reason, I suppose, is the misguided addiction of judges and law clerks to citing precedent in *LIFO* order. While everyone had looked to Friendly's opinions as the guiding standard for whatever he wrote about, the cases that came to be cited first were the ones that merely repeated, often woodenly, the subtle propositions he had authored and explained. In a very short time, the Friendly opinion dropped to third or fourth place in the list of citations, and then it dropped off the page altogether.

Some of Friendly's most admirable judicial qualities also contributed to the obscuring of his reputation. He was a judge's judge, not flashy, not a headline grabber, not looking for quotable one-liners. He shunned the rhetorical gambits that are designed to make the resolution of a complicated problem look more incontestable than it really is. His opinions made difficult reading for lawyers, and their complexity made them inaccessible to those not trained in the law.

Another reason for Friendly's puzzling obscurity was his inclination towards moderation. He did not seek opportunities to discard precedent in favor of results more to his liking. He was not interested in intellectually pure but impractical resolutions. He was a pragmatist,

always attuned to the practical consequences of rules of law and to the tendency of abstract principles to push beyond their utility.

He was keenly aware of how ill suited courts and judges are to chart the course for society. His rulings were not destined to make headlines, not to be extolled in editorials. They were nonetheless the very finest exemplars of the judicial craft.

Mike and I thank the ALI very warmly for this extraordinary and overwhelming honor. Thank you.

(Judge Leval received a standing ovation.)

President Ramo: Chief Justice and Pierre, in the last few days I have had some of our new members express to me surprise that they had been chosen to be in this company, a feeling I share pretty much every minute of every day. What has been so important about this morning is that you have told us what we are now supposed to do. Thank you very much for that.

Chief Justice, I hear you have some other things on your plate this morning, and so we will let you go and not have to have you sit and vote with us on the following projects. Thank you. *(Laughter)*

Chief Justice Roberts: Thank you very much. Thank you all.

(Chief Justice Roberts received a standing ovation.)

President Ramo: Well, what a way to start the last morning of the Meeting!