III
REMARKS AT OPENING SESSION UPON RECEIVING FRIENDLY MEDAL

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President Ramo: Next we have the great honor of having an opportunity to present the Friendly Medal. I have often thought, both in his life and in his name, that there could be no more felicitous name for a judge than Judge Friendly, unless maybe it is John Minor Wisdom, (*laughter*) although when I met Judge Wisdom he reminded me that the emphasis was on the Minor. I don't know if that was true. (*Laughter*)

I have asked Judge Louis Pollak to present the Friendly Award on behalf of the Institute. One of the things, I think, that all of us come to feel, beginning in law school, is that our friends and especially our colleagues who are our friends understand our lives in ways that maybe other people do not. It seemed to me as the Institute voted to give the Friendly Medal this year, that our distinguished honoree should be introduced by someone who knows him as a friend and colleague, so it is my honor to introduce Judge Pollak. (*Applause*)

Judge Louis H. Pollak: Thank you, President Ramo, for the privilege of introducing and talking with you briefly about the person who is today to be honored with the award of the Henry Friendly Award.

Henry Friendly is known I'm sure to every member of the legal profession who is, say, over the age of 50, but there are some, including perhaps some new members of the Institute, who have less acquaintance with who that giant of the law was, who was also a great figure in the work of the Institute.

Henry Friendly was a judge of the Second Circuit. He was a very distinguished practitioner before becoming a judge. On reaching the court and building a record of jurisprudence essentially unmatched in his generation, what Henry Friendly achieved, I think it is fair to say, was a celebrity among judges who did not achieve a place on the Supreme Court, a celebrity I think matched only by Learned Hand, and that is strong company.

The Henry Friendly Award has for years been administered—although management is now shifting to a broader committee—by Pierre Leval, whom you've just heard from, and Michael Boudin, and their special proprietorship of the Friendly Award stems from the fact that both of them were law clerks to Henry Friendly. That, I think, in

a way is pretty good evidence of what an extraordinary figure Henry Friendly was.

Indeed, as I listened to Pierre's marvelous presentation, it occurred to me, perhaps I am mistaken, but it occurred to me that it was such a splendid address that it was perhaps something that Pierre had found in Judge Friendly's files. (*Laughter*)

The respect in which Henry Friendly is held is reflected in the identities of those who have received the Henry Friendly Award, and it is an award of such cherished value that it is only given very rarely; four times, I believe, in the history of the award. First to Edward Weinfeld, whom some of you will remember as a very, very distinguished federal judge who was, indeed, also a very close friend and companion in long walks and many conversations over the decades with Henry Friendly.

The award was then given to Paul Freund, who was, of course, the most distinguished constitutional scholar of his time and whose receipt of the Friendly Award was capped, in a characteristically elegant speech, by Paul Freund expressing his gratitude at the unforeseen award to him of an award in honor of his very close friend and colleague of decades. And Paul Freund then said of the Friendly Award that he, Freund, would spend the rest of his career trying to turn the noun into the adjective.

The award was then presented to Herbert Wechsler, whose contributions to this Institute, including his more than 20 years as Director, are well known to all of us.

And most recently and happily with us today—I'm afraid the previous winners have all died—happily with us today is William Coleman, the most recent award winner and very celebrated, of course, with a practice of enormous consequence for decades, and service as Secretary of Transportation in President Ford's cabinet. But the part that is of particular pertinence for us today is that William Coleman was one of the remarkable group of lawyers assembled by Thurgood Marshall to help him in preparing to bring to the Court the cases which became Brown v. Board of Education [347 U.S. 483 (1954)]. I think it is fair to say that Thurgood Marshall looked more to Bill Coleman than to anyone else for assistance in developing the theories on which to proceed. I suggest that this has special relevance for us today because, as President

Obama reminded his audience at Notre Dame, yesterday, May 17th, was the 55th anniversary of Brown v. Board of Education.*

Why does that have special pertinence for us today? Because today we present an award in the name of Henry Friendly to a lawyer whose achievements in practice are of great consequence, whose initial career as a teacher and scholar was important, but what we properly focus on today, I suggest, is his work as a champion of liberty and decency and effectiveness in the administration of justice in the Department of Justice.

So I will try to omit all mention of other aspects of Nicholas Katzenbach's career. I will say nothing about his being a Rhodes Scholar. I will even say very little about his role as Editor-in-Chief of the *Yale Law Journal* as a student, (*laughter*) except to say that he was, in that position of authority, a figure of intimidation until you discovered that he was really a very benign despot. (*Laughter*)

In the late winter of 1960, after the election of John Kennedy as President and the recruitment of lawyers of talent to staff the Justice Department under the leadership of Bobby Kennedy and with Byron White as the Deputy Attorney General, Nicholas Katzenbach was recommended by Byron White to Bobby Kennedy and to John Kennedy as the proper person to be appointed Assistant Attorney General to head the Office of Legal Counsel.

We all know the importance of that position, the office that decides what the law is as viewed by the Department of Justice on behalf of the government of the United States. I think it is fair to say that if Nicholas Katzenbach had been heading the Office of Legal Counsel for the last half-dozen years, there would have been no torture memos produced.

The problems that beset the Department of Justice in 1961 and for the next four years were dominantly problems that had their genesis a

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*Judge Pollak failed to mention four other relatively recent recipients of the Friendly Award: Linda Greenhouse and Anthony Lewis were joint recipients of the award in 2002, and Ronald M. Dworkin and Richard A. Posner were joint recipients of the award in 2005.

decade before with the decision in Brown v. Board of Education. Finally we had an administration in authority that was prepared to regard, as its first order of business, seeing to it that the constitutional rights pronounced by the Supreme Court in Brown v. Board of Education were being carried out with the support of the federal government.

Nicholas Katzenbach, Byron White, Bobby Kennedy, Lou Oberdorfer, John Douglas, Burke Marshall, and their colleagues labored intensively to master the difficult process of assisting in the enforcement of the rights of those who were properly calling for the intervention of the United States government against political leaders and so-called law-enforcement officers in the South, while at the same time having the difficult task of urging on civil-rights leaders, Dr. King and all of his colleagues, that a little moderation in demands might make enforcement easier.

Walking that complex path, Nicholas Katzenbach found himself, not just in the Office of Legal Counsel, which one would have thought was slightly remote from those problems of enforcement, but soon in his capacity as Deputy Attorney General, stepping into the vacancy left by Byron White's appointment to the Supreme Court. Nicholas Katzenbach found himself, with the full support of Attorney General Bobby Kennedy, taking a leading role in an extraordinary era.

And so you find Nicholas Katzenbach taking the leadership in what was, in effect, a military venture to see to it that James Meredith was properly enrolled in the University of Mississippi, a task that Nicholas Katzenbach took on at personal risk. But personal risk was not new to someone who had been a prisoner of war in Germany in World War II.

It was Nicholas Katzenbach again who was there in Alabama to tell George Wallace to move aside so that black students could be properly registered in that university. It was Nicholas Katzenbach who, together with Burke Marshall and their other colleagues, saw to it that Congress would carry out the promise which Lyndon Johnson made to the American people after the assassination of John Kennedy that the civil-rights legislation which Kennedy had called for would in fact be enacted by the Congress of the United States. It was primarily Nicholas Katzenbach

who, in 1964, sat with the leaders of Congress and told them, yes, this is what President Johnson wanted and it was not to be compromised.

And as Katzenbach made sure that the 1964 legislation passed, which has, of course, been the platform for so much that has been done to assure the equal rights of citizens both to places of public accommodation and to employment, that legislation was soon to be balanced with voting-rights legislation in 1965. That legislation, guaranteeing the basic democratic right of full participation in the electoral process, represents a vindication of American history that I trust will not be lost sight of by the Supreme Court as it considers the litigation now before it testing the continued vitality of the Voting Rights Act of 1965.

After Bobby Kennedy retired from office, Lyndon Johnson asked Deputy Attorney General Nicholas Katzenbach to be Attorney General of the United States, and of course Nick stepped into that job. He stayed as Attorney General until, at the instance of Lyndon Johnson, Nick Katzenbach moved to another position of consequence in the administration of Lyndon Johnson as Undersecretary of State. That was a travail of a different kind, a travail of a different kind because of the tragic involvement of our country in the Vietnam war.

It is not the participation in the work of the State Department that is the special focus of the award to Nicholas Katzenbach; it is his triumphant activity in the Department of Justice in his several roles and, as I seriously assess what that enterprise meant, I think it is embodied in the following sentence, which appears in Nick's wonderful recently published memoir entitled *Some of It Was Fun: Working with RFK and LBJ.*

This is what Nick wrote: "In our democracy, the Department of Justice is the important conscience of the executive, whose duty is to administer the law fairly and impartially."

Because Nick Katzenbach embodies what he wrote, this Institute awards to him the Henry Friendly Award. (*Applause*)

Mr. Nicholas deB. Katzenbach: Of course, it is a great honor to receive the Henry Friendly Award and a particular pleasure to receive it

from Judge Pollak. I have known Lou for more than 60 years and always admired his extraordinary intelligence, his scholarship, his courtesy, his integrity, and his honesty, and most of all, perhaps, his modesty, but I have never been able to figure out how, with all those qualifications, he became a judge. (*Laughter*)

Judge Friendly was a great jurist and a great contributor to the work of the Institute. His passion for the integrity of the legal process is shared by those who have received the Medal before me and I have never been more flattered than to be included in such company.

I emphasize the word "process," because improving that process is what the ALI is all about. The process is designed to ensure that the policies incorporated in legal rules are administered fairly and objectively and fairly and with understanding. Whether the dispute is private, between private parties, or between private parties and the government, the focus is upon actual or potential disputes and, in a sense, lawyers are prone to see matters adversarily from the viewpoint of their clients, but the process governing disputes is neutral, designed to bring out the facts and relate it to those principles, as objectively as possible, and to be fair with respect to the policy reflected in those principles.

The system works quite well because largely the rules are known and accepted by the parties, and the lawyers know how independent judges are likely to rule in the great majority of cases. Words, of course, are slippery and their application to certain sets of facts is not always clear. Keeping that area of uncertainty as narrow as possible in the selection of the better of competing rules is what the ALI seeks to do. I make this fairly obvious point, so much better made by Judge Leval, only to make another.

The legal process is an essential foundation to our political system. It is not designed to make the policy that law embodies, although it cannot avoid doing so marginally. When a judge or the ALI selects one contention over another where the issue is to reach a broad language of the Constitution, it may, of course, have major policy consequences whichever way it is decided, but, at least in theory, law made in this fashion is regarded as incidental to the legislative process, not a part of

it, and the integrity of the legislative process depends on the legal process maintaining an apolitical ethic.

For virtually all of my lifetime, keeping policy abreast rapid technological and social change has, unhappily, diminished the capacity and the willingness of legislatures to play effectively their dominant policy role. Inability to face up to difficult and often controversial issues has had two obvious effects. First, more and more power has been delegated to or claimed by the executive, whose modest constitutional job is to carry out the law, not to make it, and secondly, increasing efforts have been made to expand the bite of existing law and thus determine policy through judicial decision when on constitutional grounds often and also in determining the reach of regulatory policy.

Now it is unavoidable that as the world grows smaller, trade and business become more international, that the presidential leadership is necessary. That doesn't make the founding fathers wrong in fearing a strong executive as a threat to democratic freedoms or to the legal process, which would then cease to be neutral.

It seems to me that presidential leadership means simply that we must be particularly careful to ensure that the executive acts within the law and that his leadership is used to persuade the Congress or the legislature to enact the laws he perceives as important for reasons of public policy and not to usurp that legislative role.

The opinions of the Department of Justice during the Bush Administration with respect to many aspects of presidential power, particularly those surrounding the so-called "enemy combatants," illustrate this point. Opinions as to the treatment of these people, especially, of course, the sanctioning of torture, were scarcely models of objective legal reasoning. Apparently, the Attorney General and his subordinates thought it their function to attempt to find arguable justification for what the President thought was in the public interest.

But the job of a lawyer rendering advice is not to seek to satisfy the client's wishes, but it is to inform the client, as objectively as possible, what the law requires or permits and make every effort to ensure compliance. I think that is a lawyer's duty whoever the client is, a public official

or a private enterprise, and however anxious the lawyer is to please the client, the advice should be informed, honest, and as objective as possible. It should not depend on the client's desires or even on a view as to the desirability of the end sought.

When rendering advice, Congress is not an adversary because the President would like a different set of rules, nor is the government an adversary where a private client has similar dislike for some regulation. In an important sense, lawyers are protecting the political system's insistence that policy is a function of legislation and that all public officials and private citizens have an obligation to comply with its rules whether they like them or not.

Preserving the rule of law is a whole lot easier in concept than it is in practice. Lawyers can use their skills to clarify policy and to show potential difficulties with a rule, as I believe the Institute has always done. But lawyers can also use those same skills to invent ambiguities where in reality none exist and to create plausible justifications for very questionable practices.

Just as we seek rational analysis of existing rules from judges and count on that process in giving legal advice, we expect rational decisions as to policy from legislators. That requires at least a measure of independence, not from voters but from those with a financial stake in the policy under consideration.

The obvious difficulty with making our political system work is not information but, put simply, it's money. Money in any form to the decisionmaker affects rationality, and I do not believe that the distinctions between contributions, gifts, and bribes works very well.

Legislators, like judges, must have some freedom for monetary independence, monetary dependence. We must find ways to take that dependence on money out of the system, and the cost of doing that is trivial compared to the cost of not doing it.

The problem of giving sound objective legal advice becomes difficult because we lawyers traditionally have always been concerned about the best interests of the client, and many CEOs today feel passionately about governmental regulation, which they sincerely feel to be excessive

and unnecessary. Accordingly, they feel no moral compunction in trying to avoid the law. They aren't unlike the government official who feels that torture is essential to the public interest. It isn't easy to tell such a client to obey the law, and it is a whole lot easier to seek some plausible excuse for noncompliance which appeals to a client and which he may, even knowing its risks, accept. The difficulty of giving advice to the client that the client doesn't like is compounded when the lawyer has a monetary stake beyond the fair value of his time.

I read, recently, in the newspaper that the Association of General Counsel, a group which, unlike the ALI, does not leave the client outside the door, advocates that all legal fees should be based on results, and such a proposal makes me frankly concerned for the integrity of the process.

Whenever the Attorney General stretches arguments supporting the law to please his client, he is politicizing the process. Whenever a judicial candidate is appraised on factors other than his or her professional competence and independence in an effort to promote a preferred policy, the legal process is being politicized. I am also suggesting that whenever a lawyer rendering legal advice to any client which is influenced by the client's policy preferences, that lawyer, too, is politicizing the process. The process isn't perfect, but it is dangerous to exploit its imperfections.

So I want to thank you all for listening to the concerns of an old man, to thank you for the honor that is being bestowed on me, to thank you for the integrity you have so consistently demonstrated in improving and preserving the legal process, and I not only take pride in receiving the Friendly Medal but I take particular pride in the association of many years with all of you. (*Applause*)

President Ramo: What I think we would say, Nick, more appropriately about you, has nothing to do with your age, but in our country we would call you a national legal treasure. Thank you.

I try to read *To Kill a Mockingbird* every year, and as our entire company just stood up, Nick, I was reminded of that wonderful part in the book where Harper Lee writes, "Stand up, there's a lawyer walking by," and that's what we were all thinking about you today.