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REMARKS

By The Honorable John Paul Stevens
Associate Justice of the
United States Supreme Court

The Sixty-sixth Annual Meeting
of The American Law Institute
convened in the Ballroom
of The Mayflower, Washington, D C ,
on Tuesday morning, May 16, 1989,
and was called to order at 10 a m by
President Roswell B Perkins

PRESIDENT PERKINS: To open our proceedings, we have the distinct honor that Justice John Paul Stevens has accepted our invitation. Last year, we asked him to lead us into Chicago, his home territory, but, regrettably, his schedule did not permit this. However, we did not want to miss the opportunity to have Justice Stevens open an annual ALI meeting, and we have captured him today.

Justice Stevens was in fact born in Chicago. He went to the University of Chicago Laboratory School in his early years, which presumably makes him an unusually experimental fellow. I certainly want to learn more about that, Mr. Justice.

He attended college at the University of Chicago, from which he graduated in 1941. World War II then erupted, and Justice Stevens served in the Navy and was awarded the Bronze Star. He next went back to Northwestern University Law School, graduated magna cum laude, and was a co-editor of the Law Review. As many of you may know, he clerked for Justice Wiley Rutledge in the next year, getting some good early training for his present tasks. He practiced in Chicago for some 20 years, from 1950 to 1970, with a heavy dose of law teaching, both at Northwestern and at Chicago, and mostly in the antitrust field. Very early in this period — from 1953 to 1955 — he was a member of the Attorney General's National Committee to Study the Antitrust Laws.

He was nominated to the Seventh Circuit bench in 1970 and was elevated to the Supreme Court five years later. His intelligence, his imagination, and his judgment are legendary. He is clearly one of the Court's greatest assets and indeed one of the nation's great public servants. In his spare time I understand he does some flying. Is that still true, Mr. Justice? Reasonably true. And he plays tennis and quite a few other things. Thank you so much for honoring us today, Justice Stevens, and we look forward to your opening remarks. *(Applause)*

JUSTICE JOHN PAUL STEVENS: Thank you very much, Mr. President. Fellow lawyers and friends, I don't have a prepared statement of any great length or depth. I do want to welcome you all here and thank you for your continuing work on the development of the law in which the ALI is continually engaged. I just have two subjects I want to address very briefly.

Mention was made of Chicago. I attended the Seventh Circuit Conference a couple of weeks ago, and one of the topics on the agenda was the growing lack of civility among members of the bar and of the trial practice and possible solutions to this situation. One of the explanations for the problem was a suggestion that maybe the bar has gotten so large that lawyers do not see one another as often, and perhaps they feel they can do things that they would not be proud of if they knew they had to confront the same adversaries and judges again as frequently as perhaps we used to years ago.

I disagreed with that. I like to dissent from various propositions *(laughter)*, and I had the opposite view. Actually our profession is perhaps a lot smaller and more intimate than the young lawyer tends to realize. I have often been struck by the number of times that our paths cross and recross as we go through our work from year to year, in trial and judicial work, as well as in scholarly endeavors, such as those you are going to be engaged in. Today, I am particularly pleased that an award is going to be given to Paul Freund. I first encountered Paul as a student at Northwestern Law School when he delivered the Rosenthal lectures. I can still remember some of the good sense that he imparted about the tactics that the United States Solicitor General's Office employs in its selection of cases to appeal to the Supreme Court. He explained that this Office, in deciding how the law will best be developed, chooses particular cases, as well as the sequence of their presentation. It is also appropriate to note that the seat I occupy, as some of you may know, was formerly occupied by Justice Douglas, who in turn had succeeded Justice Brandeis. Therefore I can develop a sort of a remote kinship to Paul Freund

because he was a law clerk to Justice Brandeis, as was Judge Friendly, in whose name the presentation is to be made today.

The way things work together in this profession goes even beyond that, because one of Judge Friendly's law clerks was Judge Leval, who is on the committee that selects the recipients of the award, and Judge Leval had two law clerks named Randy Moss and Lewis Liman, who are now clerking for me, so that through these generations we work back and forth and cross paths more frequently than you might think.

I could give many, many examples of the way in which paths cross. It is significant and it is really most rewarding this morning to see so many friends that I have known in different contexts over the years. It is a wonderful thing about our profession, that we do develop friendships and feelings about one another that transcend the specific work that may be confronting us at a particular time.

But the second thing I wanted to do, since I have a captive audience, is to perform a function that judges don't always get a chance to do — that is in the nature of filing a petition for rehearing. When I first went on the bench — I think it was either the first or second opinion I wrote — a petition for rehearing was filed by the losing lawyer for the losing litigant. It was really quite intemperate, and I thought it was very unfair in its criticism of the author of the opinion and of law and order. It also labelled him a Nixon judge and accused him of all these terrible things that were being said about him. Then I realized that one of the very important functions of the petition for rehearing, of course, is to let the losing litigant let off steam. It serves a purpose that he has been able to have what is almost the last word in the controversy, and that's useful.

Well, I'm not going to have the last word here, but I thought that I might mention an area of the law that I sometimes think of as a trap for the unwary. I have the feeling, sitting on the Court, that much more often than we like to realize, there are cases that come out in unfair ways, and I would like to identify three of them.

One of them was a case called *United States v. Locke*, 471 U.S. 84 (1985), in which some individuals who had very valuable mining claims failed to make an annual filing by the deadline. They filed on December 31st, but the statute said they had to file prior to December 31st, and the Court was unwilling to interpret the word "prior" as meaning the equivalent of on or before December 31st. There was some disagreement about whether that actually reflected the intent of Congress. Justice Marshall wrote the majority opinion in that case, I wrote the dissent, and Justices Powell and Brennan also dissented. I just mention that because we have shifting alignments on issues of this kind. *(Laughter)*

A second case that's somewhat similar in the way it came out was a case called *Schiavone v. Fortune*, 477 U.S. 21 (1986), in which a gentleman wanted to file a libel suit against *Fortune* magazine. The case involved interpretation of Rule 15c of the Federal Rules of Civil Procedure. The plaintiff sued *Fortune* and gave the correct description of the publisher of *Fortune* magazine, including its address, but he failed to mention that it was actually Time, Incorporated, that was the corporate name. He moved to amend the complaint to make that correction, but of course he did so after the statute had run. The Court held that that was the end of his lawsuit. Justice Blackmun wrote the majority and the dissenters beside myself included Chief Justice Burger and Justice White; so again we're not lining up in our normal supposed coalitions.

The third case, *United States v. James*, 478 U.S. 597 (1986), was a tort case against the United States that involved two accidents on two different reservoirs. The government, everybody agreed, had negligently failed to warn the people who were using the reservoirs for recreational purposes, such as boating and water skiing, that they were going to open the floodgates and the water was going to develop a very serious and swift current, and consequently they'd be dragged down into the gates and drowned, which did happen – so there was really quite a dramatic case of negligence. The Court con-

strued a statutory provision that had been included in the 1928 Flood Control Act that had been drafted when Congress was concerned about the costs of acquisition of property rights. This provision provided that the United States should not be liable for any damage occasioned by floods or flood control. Of course it was some 18 years later that the Federal Tort Claims Act was enacted. It waived sovereign immunity but, apparently unaware of the 1928 provision, it said nothing about flood control situations. The plain langnage of that old statute was sufficient to convince the Court that recovery should be barred in this case. The Court split, as we seem to do these days, by six to three: Justiee Powell this time wrote the majority, and Justices Marshall and O'Connor agreed with me that that was an incorrect interpretation of Congressional intent.

Now these three cases, one in 471 U.S., one in 477 U.S., and one in 478 U.S., followed in a fairly short period of time. If you read our work product in almost any year you will come across cases of that kind, where the result is correct as a matter of law, and yet it doesn't quite strike us as being compatible with the just disposition of the case. These cases present traps for unwary litigants, and of course in the flood case a more serious trap for unwary water skiers and the like. I would suggest that, while you're engaged in your very important deliberations on some of the great issues and fundamental problems of the law, perhaps you can find time to examine and think about the sort of remote corners of the law where very unfortunate results sometimes occur but there's no large lobby interested in resolving theso problems. Those cases for the most part remain unreversed or uncorrected by Congress, and I think perhaps there should be some kind of a committee on scriveners' errors or mistakes that would periodically police our work and see whether there should be further action taken.

I remember going back to the Seventh Circuit. You mentioned that you were there last year. Judge Hastings told me once that he'd come down to a meeting in Washington and talked to one of the Justices — I think it was Justice Jackson

– about the Court having the last word. Justice Jackson's reply was, well, we really do not have the last word; we have the last guess in our job. When we realize that all of us make mistakes, the process of correcting our mistakes and trying constantly to improve the law is something to which we should all continue to bo dedicated. I wish you well in your endeavors and thank you for what you're doing. *(Applause)*

PRESIDENT PERKINS: Thank you so much, Justice Stevens. We shall promptly ask our Program Committee, under the chairmanship of Herb Wilkins, previously chaired by Judge Pat Wald, to consider a project on errors and omissions, and we hope that you will follow it with keen interest.