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ADDRESS

By The Honorable Arlen Specter
*United States Senator from the Commonwealth
of Pennsylvania*

*The Wednesday luncheon session
of The American Law Institute
convened in the State Room
of The Mayflower, Washington, D.C.,
on May 20, 2009.
President Roberta Cooper Ramo presided.*

President Ramo: Ladies and gentlemen, it is always hard to ask a crowd that is engaged in such fabulous conversation to be quiet so I apologize, but as I told the Senator, this is one of the best attended, most sought after luncheons on a Wednesday after a week of really hard work that we have ever had, and no surprise.

This has been an extraordinary session of The American Law Institute in every way, and thanks to the good offices of our member, Flora Becker, we are able to hear today from one of the most remarkable senators really in history, in a lot of ways, and that is Senator Specter.

Everybody, at this point in America, who reads a newspaper or watches television knows a little bit about Senator Specter, but I want to focus on a couple of things in introducing him. First of all, he has managed to climb to these heights overcoming the disabilities of a law-school education at a mediocre law school somewhere in New Haven, as I recall, (*laughter*) and also he has survived having been a classmate and a friend all these years of our own George Freeman, so we all know that that is a significant achievement in every possible way.

His work on the Senate Judiciary Committee, through so many challenging times, has been something that has been watched with fascination across the United States.

I didn't know two things, Senator, when we invited you to speak. I didn't know that we would be on the eve of another United States Supreme Court Justice nominee, putting you once again at the epicenter of things, and I didn't know you would be a Democrat. (*Laughter*) (*Applause*)

But as I've thought about it, I think in a way, given the enormous need or requirement for bipartisanship—I mean this in a very serious way—to solve the problems of the country, you may be our first post-modern senator. (*Laughter*)

The one thing I want to talk about actually before the Senator comes up is the enormous courage that he has had not just in his political career but in facing the crises of health. My husband, as many of you know, is a physician. He often remarks about the fact that illness,

he has found, often brings out in people who are not such great people the worst and in people who are great people the best. Your courage and insistence and victory in living a totally and full, complete life is important not just to you, your family, and your constituents, but it has been a remarkably important thing in the lives of so many people who are ill at any moment and look at you and say, "It is possible to win a victory over illness."

So with that, let me thank you for being here, and let me introduce our postmodern senator, Arlen Specter. (*Applause*)

Senator Arlen Specter: Thank you very much, Roberta, for that splendid introduction. I noticed, when you mentioned Democrat, that half of the audience applauded. (*Laughter*) Obviously a bipartisan group.

When you say well known, the only way I can think of to have become better known would have been to have been indicted, (*laughter*) and some people say there's not a whole lot of difference. (*Laughter*)

Thank you for your comments about my bout with Hodgkin's and my response. Just a comment or two about that. I lost all my hair, which is what happens when you have Hodgkin's, and I was presiding over the confirmation hearings of Chief Justice Roberts at the time, and suddenly I got more fan mail on my hair style than on my positions on public policy, (*laughter*) and some suggestions that I should wear a toupee. I rejected that. Others said I should shave my head and become a sex symbol. (*Laughter*)

Roberta, what's so funny about that? (*Laughter*) Look at how well it's worked for Rick Berkman.

But I decided not to shave my head and become a sex symbol for two reasons. One is that my wife was opposed to it, (*laughter*) and with a reason like that a guy wouldn't need a second reason. (*Laughter*) But I had one: I wasn't qualified.

It is a pleasure to be with this distinguished group, find so many friends, Flora Becker, a lifelong friend. She and my wife, Joan Levy and

Lyman, sat together at grade school, high school, and her husband Ed and I were lifelong friends at Penn and then again at Yale.

I see so many friends. Bill Coleman, he and I were assistant counsel to the Warren Commission together. And Judge Pollak and George Freeman. Practically like old home week.

Whenever I begin a speech, I take off my watch, look at it carefully to give my audience a false sense of security that I (*laughter*) am going to pay attention to the time, but I told Roberta I would leave time for dialogue and I will.

It is a focus of attention in this town today on a number of subjects that I want to talk about. One is the growth of executive power and what the Congress can do by way of oversight, which implicates the current controversy between Speaker Pelosi and the CIA, and then there is the issue of another nominee for the Supreme Court, all matters which impact on the topic that I will address today.

The period of time from September 11th to the present has seen the greatest expansion of executive authority, I think, in the history of the country, and the checks and balances have been very, very inadequate.

When I was chairing the Judiciary Committee, we were in the final stages of working on the Patriot Act on the Senate floor when the story broke about the terrorist-surveillance program, warrantless wire-tapping, flat violation of the Foreign Intelligence Surveillance Act, and a very difficult question as to whether the President had constitutional authority under Article II, as Commander in Chief, to supersede the statute.

Well, it's never been resolved to this minute. Lots of efforts were made to do so, including my effort to subpoena the telephone companies. Vice President Cheney, in a well-publicized move, went behind my back and got enough dissenters so that we couldn't get those subpoenas issued.

The federal court in Detroit found the program unconstitutional. The Sixth Circuit found lack of standing over a very powerful dissent,

a very flexible doctrine on standing, I thought they should have taken it, and then the Supreme Court of the United States refused to take the case, and we still don't know the answer to that. I can't think of a—well, it is one of the most troubling issues, I think, that the Court could have confronted in modern times, and one of the proposals that I am advocating to try to get it resolved, and other issues like it, is for legislation to be passed where Congress would mandate the Supreme Court to decide the question. We have the authority to do that, as I understand the law, and we ought to have a decision.

That is a question I intend to ask the nominee. I can't ask the nominee how the nominee is going to decide cases, we all know that, but I think it is a fair question to say, "What cases will you hear? What cases will you take? What cases will you duck?"

Then a similar problem, later corrected, occurred with the habeas corpus issue. The Congress went through gyrations to circumvent habeas corpus with military tribunals, but then we were never really sure there was any habeas corpus requirement because the Attorney General of the United States, Alberto Gonzales, said there was no constitutional requirement for habeas corpus.

That is a laugh line, guys. (*Laughter*)

I said to him, "Well, how about the clause that says habeas corpus may be suspended only in time of invasion or rebellion?" Well, that didn't mean a whole lot to Attorney General Gonzales.

And then the Supreme Court first denied cert. Only three justices said it ought to be taken, and then there was a damning article written by a lieutenant colonel who was intimately connected with the tribunals, and the behind-the-scenes speculation was that Justice Stevens did not join the three other justices to grant cert because he was concerned that if cert was granted it would lead to an unfavorable ruling.

An article appeared in *The New York Times* commentary on that, that looked fairly authoritative, although really speculative, and then on a petition for reconsideration of cert, which requires five votes, he

got the five votes, and Justice Stevens and Justice Kennedy joined, and they upheld the right of habeas corpus. But that was a close call, too, a very, very big issue that really needed to be decided by the Supreme Court.

Then we have the signing statements. The Constitution, as you all know, has a presentment clause. The approach is Congress presents legislation to the President, he signs it or he vetoes it, but now we find an era of cherry picking, and on big matters, on torture. Senator McCain led the fight. The Senate passed it 90 to 9. The President and Senator McCain, President Bush and Senator McCain had a well-publicized rapprochement dealing with the issue specifically. The President signed it and then he put on a signing statement taking it back.

On the Patriot Act, one of the very key points for me was oversight, and we negotiated that with the White House, passed the Patriot Act, then the President issues a signing statement taking away what we were really looking for there, and I have introduced legislation. It is pretty tough to deal with it in a legal context, you would have to get two-thirds, override a President. No President is going to say to you, "I'll agree to have court jurisdiction over my signing statements."

And then there is a question of standing, but we really have to find some way to get a judicial determination, and we have to have the Court arbitrate these disputes. Congress, the Senate Judiciary Committee has very little ability to really deal with the expansion of executive authority if we are not backed up by the Supreme Court.

The issue of oversight has come very much into the public fore on the battle between the Speaker of the House of Representatives and the Central Intelligence Agency, and it is a very important question as to what information we get on oversight from the Central Intelligence Agency, and the CIA has a very bad record when it comes to—I was about to say being candid; that's too mild—to honesty.

It goes back a long time to the mining of the harbors in Nicaragua when Senator Goldwater, then chairman of the committee, took on Director Casey, picked up on Iran Contra. I was on the Intelligence Committee in Iran Contra, and Director Casey appeared and gave

perjurious testimony to the committee. His testimony was prepared by the deputy director, who was then nominated to succeed him, and the nomination was withdrawn when the deputy director was implicated in the preparation of the testimony, which was not accurate, and then came within a hairsbreadth of being prosecuted by independent counsel.

During my tenure as chairman of the Intelligence Committee of the 104th Congress, there were repeated instances where we didn't get information that was there. One situation arose which, candidly, I wouldn't believe if somebody told me about it, and you can test your own credibility on it.

There was a key operative in the Central Intelligence Agency who started in the early '50s and was working through the '90s, and some information came from the Soviet Union that was tainted and, knowing that it was tainted, the official gave it to the President of the United States without telling the President it was tainted.

It is hard for me to believe that that could be done, but I made inquiries as to the individual so that we could have a hearing with him, found out that he had retired, had a heart condition, but lived a few miles away in Virginia, and I went there with a stenographer and swore him in and took a deposition, and his testimony was, "Yes, I knew it was tainted."

"Well, why didn't you tell the people whom you gave it to, including the President, because they wouldn't rely on it? Well, weren't they entitled not to rely on it?"

"No. My experience told me that it was accurate."

"Well, even if your experience told you that it was accurate, didn't you owe it to the President of the United States to tell him what the facts were?"

And he insisted on it, and then questioning all the people, all the people around him. So it is a real problem as to how you get the information.

Director Panetta says that the agency does not make it a habit to misinform Congress, and I believe that is true, it is not the policy of the Central Intelligence Agency to misinform Congress. The CIA has enormously devoted people all over the world, and when I was chairman, I visited many installations everywhere, high-risk operations and really devoted servants, but that doesn't mean that they're all giving out the information.

And there is some understandable reluctance to tell Congress, because Congress, well, you know the old story, the ship of state leaks at the top. Well, it leaks all the way up to the top, and we have had people kicked off the Intelligence Committee for leaking information, had people subjected to criminal investigations for allegedly leaking information, and there is a great reluctance to say too much, and understandably so.

There is a real tension that goes on there, and the current controversy involving Speaker Pelosi and the CIA is very unfortunate, in my opinion, because it politicizes the issue, and it takes away attention from what ought to be the focus of attention, and that is, how does the Congress get accurate information from the CIA? What do we do to get the information?

All the brouhaha is about who's right and who's wrong. Speaker Pelosi says she was misinformed and that is immediately translated into she called them a liar. A little different, in fact it's a lot different, saying you were misinformed as opposed to being a liar. And then one after another, for political gain, people are making headlines on the talk shows and here or there and everywhere.

Yesterday in *POLITICO*—I know it is a publication you read shortly before you take a look at *The New York Times*. (*Laughter*) Not too many people here even know what *POLITICO* is, with that modest response. *POLITICO* is one of the newspapers on Capitol Hill.

But there was an article, yesterday, by former Congressman Martin Frost, who presided over a hearing, co-presided over a hearing shortly after 9/11, and he asked a question. The briefer had said, gone along, as Frost describes it, as a rambling explanation to a question

asked by former Congressman Frost, "You're saying that the CIA knew about these three people and told the FBI, and that the FBI lost track of them and they piloted the planes?"

And Frost describes a long, rambling description, and then Frost said, "Does that amount to a yes?" The briefer said, "Yes, that amounts to a yes." So Frost comes to the conclusion that both the CIA and Speaker Pelosi could both be telling the truth.

I did a fair amount of work with Miss Pelosi, when she was a congresswoman on the Subcommittee for Health and Human Services, on conferences we had a long time ago, and then saw her when I chaired the Intelligence Committee, she was one of the junior members on the House side of the Intelligence Committee, and I found her to be reliable and very able, but it is my hope that we will put aside all the politicization and move to try to find an answer.

And I have a suggestion, which is to record the briefings. Have a stenographer there. Have stenographers at all these hearings, which aren't exactly worthy of a great deal of attention, then there is no dispute as to what was said.

Speaker Pelosi wants the notes disclosed. I think they ought to be, in the interest of transparency. I see that Senator Shelby, who had been chairman of the committee following my chairmanship, says they ought to be disclosed; he thinks that would settle the matter. Well, if they disclose methods and procedures, you can't make them public, but they could be inquired into by the Intelligence Committees or, if you think the Intelligence Committees are composed only of Democrats and Republicans, find a Foreign Intelligence Surveillance Court or find somebody to look at them and make a public pronouncement as to what was done.

I think the Speaker is entitled to have as much light shed on it as possible. So is the public. The public is entitled to know what went on there. But I am going to suggest the matter of having notes of testimony. Intelligence Committees can do that as a matter of course. The CIA could insist on it, or Congress could pass a law requiring it,

but with the very sharp focus that this controversy has brought, I think that really ought to be done.

I yield the floor. Questions? (*Applause*)

President Ramo: It is a wonderful thing to have the confidence that somebody as thoughtful and with your experiences is in the rooms where such important judgments are made.

The Senator has said he will take questions. He is going to come down to you or towards you, and so there is a question right over there. Senator.

Unidentified Speaker: Senator, in light of what you have just said, I would be interested in your views on revisions of the War Powers Amendment that have been discussed by the new Administration and whether you think the War Powers Amendment, in terms of the powers of the executive and the legislature in terms of use of force, needs some rethinking as well.

Senator Specter: I think it would be a good idea to revisit the subject. I don't think the War Powers Act works, and it ought to be reexamined. How you deal with it, and how we can top what Senator Javits did on it way back when, remains to be seen, but I think it is worth tackling.

I had grave reservations about the authorization for the use of force in 2002. I did some research and found that there was a real constitutional question as to whether Congress could delegate the authority to declare war. The use of force really is a declaration of war, and the authority was to the effect that that decision had to be made at the time, depending on exactly what the circumstances were, and that Congress couldn't say, "We'll leave it up to you, Mr. President, to decide it in the future, depending on what you think."

The counterargument on practicality was made: Well, if a President is authorized to use force, maybe Saddam Hussein will back down; we won't have to use force. But that is not a very good reason not to follow the Constitution.

President Ramo: Over there, sir.

Unidentified Speaker: Thank you very much, Senator, particularly for your comments about the signing statements, which seem to me to be a very interesting subject, in part because we really don't find a place in the Constitution or elsewhere where they are envisioned. It seems to me that the President can do whatever he wants after a statute has been adopted. At least his signing statements are a bit of transparency as to how he is planning to subvert the law (*laughter*) so—

Senator Specter: That's the first good thing I've heard about signing statements.

Unidentified Speaker: Glad we're both here. But the fact that he issues those is sort of a flash point. But if he didn't do that, but he behaved the way that he said he was going to in the signing statement, what is the constitutional remedy for that? I mean, I don't see that the issuance of the signing statements is that significant from a legal point of view, and I wondered if you had another view on that.

Senator Specter: Well, if the President deviates from the law, that is to say, violates the law, there could be a judicial challenge to it, and on that, that ought to be structured.

The real problem comes not on the insult of the signing statement but on the breach of the law, so there we would have to structure a remedy for it. We have remedies available, they are just not followed.

How you can have as big an issue as the Terrorist Surveillance Program flat out against the Foreign Intelligence Surveillance Act, which provides the exclusive remedy, and a colorable contention that Article II supersedes the statute, and not have it adjudicated, still boggles me. That is going to be a big question that I am going to put to the nominee, also the habeas corpus question, these big issues, they're not too busy.

Unidentified Speaker: (*Inaudible*) If you could proceed with a prepared signing statement, the signing statement gives you a basis upon which (*inaudible*).

Senator Specter: Well, you could proceed after he violates the law, but why not at the earliest point? And there is also a quality of disregard of the separation of powers. What are we doing passing laws when the President with impunity says, "I'm not going to follow that part of it," after he signs it? Notice my left-handed (*laughter*) gesture. Or especially after he negotiates it and then repudiates it? That's what you call mens rea.

President Ramo: Sir, all the way over to the right now, all the way there, and then we will come to you next.

Unidentified Speaker: Good afternoon, Senator. Following up on your last answer, I think it would be a fair statement to say that, in the last 15 years or so, the Supreme Court confirmation process has become more politicized. What do you think is the proper role of the Senate in inquiring into nominees of the President when looking to confirm a Supreme Court appointee?

Senator Specter: Well, that is an evolving issue. Not too long ago, prior to 1955, there had been confirmation hearings only where there were some special questions raised, and after the confirmation proceeding as to Judge Bork, who answered a lot of questions, and had to, after he had written that *Indiana Law Review* article on original intent and his other pronouncements on the subject, there are many in the Senate who take the position that there is not a whole lot of deference owed to the President.

At one time, we thought that the President made the selection, had constitutional authority, the inquiry would be on professional qualifications, education, standing at the bar. That's really pretty much changed, and my view is still that the President is entitled to considerable deference, and when the hearings are politicized, the whole process is political. Nominees campaign on the Supreme Court all the time, and they deal with all the cutting edges of the law, so I would let the process take its course. I don't think we have strayed too far, but then I participated in the Bork hearings. (*Laughter*)

President Ramo: Senator, one last question, which is all the way over there. The microphone is coming to you.

Unidentified Speaker: Senator, I was one of those who applauded when you were introduced as a Democrat, because I was wondering whether you could undertake to educate some of your new colleagues on the relationship between habeas corpus in the courts and in the Congress. As you pointed out,—

Senator Specter: I failed with the Attorney General. What makes you think I could succeed with senators? (*Laughter*)

Unidentified Speaker: And you failed in your brief in the United States Supreme Court because, although you won the Supreme Court case, for the third time in the last five, six years, Congress came back and said, no, no, we really don't want habeas corpus, and most recently we have had this kerfuffle about Guantánamo people being released in the United States. Finally, habeas corpus having been restored, a judge actually ordered release. The D.C. Circuit promptly reversed that and said, no, there's not this power, there's a cert petition pending in which presumably it would be decided yes there is a power, no there's not, there are conditions, there are constraints, and this is how habeas corpus is supposed to work, and now the Senate—

Senator Specter: You did sound like a circuit judge. You lost me.

Unidentified Speaker: The Senate Democrats propose to preclude all that by legislation in the Defense Appropriations bill to preclude any release into the United States, and I am just wondering why the Congress should cut off the judicial remedies that way, certainly in advance of letting the judiciary do its work.

Senator Specter: Why should the Congress do it? Well, the answer to that is the Congress shouldn't do it. And the next question is, does the Congress have the authority to do it? I don't think the Congress does. I don't think the Congress has the authority to tell the circuit court it doesn't have jurisdiction on a constitutional issue.

We had quite a discussion with Chief Justice Rehnquist on his confirmation hearing in 1986 about that, and after a lot of discussions,

the Chief Justice, he was Justice then, said you couldn't take away the jurisdiction of the Supreme Court on First Amendment issues.

I don't think we can. We are in a real snarl on a related subject—since that is the last question, I am going to add just a little to it—

President Ramo: Please.

Senator Specter: —on the business of the telephone companies. You have some 40 cases pending in federal court with the telephone companies, and people are claiming a violation of constitutional rights, and what the telephone companies have gotten is very, very valuable, very, very valuable, hadn't been publicly disclosed, of course we can't say what it is, but it's very, very valuable. (*Laughter*)

And I introduced an amendment that would put the government in the shoes of the telephone companies, so you don't penalize the good-citizen telephone companies. The government has to take over the case, and if there are damages or whatever, the government has to pay for it, but that amendment was defeated. Now there is an issue as to whether President Obama is going to assert that in the telephone cases. I don't know what he is going to do, and I ultimately voted for the bill on immunity because I didn't want to lose the information. It pained me to do that, but I made that decision.

But what it really does, when you take away—give them immunity, you are taking away the jurisdiction of the Court, and I think the Court could come back and say you can't do that, circuitously or no matter how you do it, and I think it is very important for the Court to assert its jurisdiction on constitutional issues so that somebody decides between the Congress and the President as to what is going on.

As we have had an evolution of the powers of the three branches, I think it has been plain that the executive has far outstripped the Congress in authority and ability for the executive to do what it wants over the will of the Congress, and the only restraint is the Court, and I think The American Law Institute ought to do something about it. That's why I came. (*Laughter*) (*Applause*)

President Ramo: Senator, we thank you so gratefully for your time, the wisdom of and interest of your words, your candor and willingness to take questions, and you have given me a trifecta. We have had three speakers this Meeting, they have all given us assignments, so now on to, speaking of kerfuffles, we will adjourn and in 10 minutes begin Nonprofits. Thank you.