President Ramo: Well, thank you very much, Judge. (*Applause*)

So Judge Wood flew back from Istanbul, got in at about 7:30 last night, which shows the enormous dedication to the cause, and so if she falls asleep, just give her a little, one of those, anybody that is sitting next to her. (*Laughter*)

I just want to say, I would like for Bob Stein and Ed Cooper and Sheila, I hope you are all here, to please just stand up for one second. I know I see Bob, I see Ed. Sheila is probably on the phone doing serious work. (*Applause*)

Each of them, as Judge Wood said, personifies the kind of dedication to The American Law Institute and its work that is required for us to be the respected organization that we are, so thank you very, very much.

Let us move on, then, and I am looking around to see where Judge Kavanaugh is. Ah, good.

So while Judge Kavanaugh comes up, I should tell you there is hardly anything that the President of The American Law Institute gets to do on her own. Everything is approved by a lot of different people, and in my case that is probably a good thing. But the one thing that you do have an opportunity to do is make the selection of the people who will speak at our Annual Meeting.

I thought, on our 90th anniversary, that it would be particularly good for us to have somebody relatively new to the bench, someone in our terms relatively new in the profession, because, after all, we are used to having people, like a 93-year-old Treasurer Emeritus, and when somebody becomes emeritus, it just means that they have been on the Council I think for 26 years. Now we have a 15-year term limit, which is sort of shocking to us.

And in asking around, as I do sitting in Albuquerque looking at the Sandia Mountains, for people that we might ask to address us on this important day, one name kept coming to me, and that was Brett Kavanaugh from Washington, DC. What people said about him that I thought was so interesting, because obviously, by definition, everybody sitting here is really smart, what kept coming to me, as I was talking to people, is that Judge Kavanaugh was a person of extraordinary intellect and what extraordinary personal qualities he had. I thought it would be a wonderful opportunity for us, in our 90th year, to hear from someone looking at the profession of the law from a slightly different point of view than some of us.

Judge Kavanaugh began his service on the U.S. Court of Appeals for the District of Columbia Circuit in May 2006. He was elected to The American Law Institute in 2009, and he is an Adviser on our Principles of Election Law project. He graduated from Yale College.

I always remember having heard all this Harvard–Yale stuff for years; that when John Kennedy got his honorary degree from Yale, he said,

"I have the best of both worlds, a Harvard education and a Yale degree." (*Laughter*)

But in this case, Judge Kavanaugh just couldn't kick the Yale habit and stayed there for law school, where he was a Notes Editor of the *Law Journal*. He had an amazing series of clerkships, Walter Stapleton on the Third Circuit, then Judge Kozinski on the Ninth Circuit, and later for Justice Kennedy on the United States Supreme Court.

He has worked in the government, and he has worked in private practice. What is especially interesting to me, I don't know how he does it exactly, distances I know on the East Coast are a little different than they are on the West, but somehow while doing the full load of his work on the court and of course the work that we continually assign him for the ALI, he has managed to teach not as a guest but full-term courses on Separation of Powers at Harvard, National Security and Foreign Relations Law at Yale, and Constitutional Interpretation at Georgetown.

Ladies and gentlemen, please let us welcome, for our 90th-year celebration, our speaker, Judge Brett Kavanaugh. (*Applause*)

Judge Brett M. Kavanaugh: Thank you, Roberta, for your very generous introduction.

Roberta is pretty amazing, as we all know, and her contributions to the profession and to this Institute are enormous and continuing, so thank you for all of that.

I also want to thank Judge Paul Friedman of the district court here in D.C., who is on the Council of The American Law Institute, for his role in my appearance here today. Paul is a great and wise judge, and among the many wonderful things I have learned as a federal judge here in D.C. is the great ability to make relationships with other judges in our courthouse. And so we have this judges' lunchroom where many of the district and circuit judges eat, and Paul and I are regulars, and we talk about the events of the day and gossip about lawyers and talk about sports and what is happening on Capitol Hill, and it is all great fun. We don't talk about pending cases, for obvious reasons, but still, after a reversal of the district court, court-of-appeals judges tend to avoid the lunchroom for a few days. (*Laughter*)

It is not ideal to eat lunch with someone when you have just publicly said that they abused their discretion, so on those days a peanut butter and jelly at the desk is just fine. Of course, it is relative bliss on those days where the district court has been affirmed. If an appellate judge wants to be compared to Learned Hand or John Marshall—and really who doesn't?—then those are the days to appear in the lunchroom.

As Roberta and Paul know, I am humbled and honored to be with you today at The American Law Institute. This is, quite simply, a bedrock and essential part of the American legal system. The Institute pursues clarity about what the law is and seeks progress about what the law should

be, and I am proud to be a member of The American Law Institute. The Institute is also a model for civil discussion and debate which is so needed in all three branches of our federal government here in Washington.

In thinking about civility, people ask me about how we get along in the DC Circuit, and we do get along. A court is like a large family. Of course, some large families are dysfunctional, but our court gets along well, and I thank Judge Edwards and Judge Ginsburg and Judge Sentelle and now Judge Garland, our last four chief judges, for really making our court work well together. And now that Judge Garland has taken over as chief from Judge Sentelle, it is nice that we don't have to wear cowboy hats to curry favor with the chief judge any longer. (*Laughter*)

Now I compare civility in the judiciary sometimes to civility in my prior job. I worked in the White House for five-and-a-half years, and one time I was with President Bush in Portland, Oregon, and he said to me and a few other staffers as we went through town, "You know the odd thing about Portland?" I said, "No. What's that, Mr. President?" He said, "Everyone here seems to have only one finger." (*Laughter*)

Among its many virtues, the ALI helps judges stay aware of the thoughts of the bar and the academy, and I am grateful for the opportunity to spend time with all of you at ALI events. Of course, as a cloistered appellate judge, any human contact is a good thing. The day the President signed my commission, I immediately went up to the Supreme Court, and Justice Kennedy swore me in, in a little private ceremony, and Chief Justice Roberts was there and my family, and that was it. So I was all excited, and then Justice Kennedy sat me down and said, "You're going to get to your office, and there's going to be a phone and a computer and a yellow pad, and no one will ever call you again." (*Laughter*)

So he told me to get out, to get involved, to teach, to get involved in bar activities, and that is one of the reasons I have so enjoyed, was so inspired to become part of The American Law Institute.

Of course, from the other direction, the ALI helps judges explain and demystify the judicial process to practitioners and academics. I think the law and the bar are poorly served when the judiciary is too cloistered and the judicial process is too much of a black box.

Of course, one humorous aspect, I suppose, of being a judge is how people treat you when you run into them outside of the courtroom, and what I find is this falls in two categories, those who have known you only after you became a judge and those who knew you before you became a judge. So the people who have only known you after are very deferential and respectful, at least when you first meet them. Sometimes it can almost get uncomfortable, and I want to hasten to add that not every judge gets uncomfortable when people fawn over them, so I don't want to discourage such activity. (*Laughter*)

But it is quite a different story with those who knew you beforehand. I would say the common reaction from old friends is bemusement, and

that is probably generous. When someone I had known for a long time was arguing before me recently, I told my clerks afterwards, "That was a really hard argument for the person to do," and my clerks asked, "Why?" And I said, "It is really hard to argue when you are thinking the whole time, 'I can't believe this guy is a federal judge.'" (*Laughter*)

Now I am a federal judge who came from the White House. I worked five-and-a-half years there before becoming a judge, and it is fair to say that certain senators were not entirely sold that that was the best launching pad for a position on the DC Circuit. And one senator in my hearing noted that I had worked at the White House and was still working there and said in his opening remarks, "This isn't just salt in the wound; this is the whole shaker." (*Laughter*)

True story. My mom said to me at a break, just trying to buck up her son, she came up to me and whispered to me, "I think he really respects you." (*Laughter*) It is always good to have Mom with you at your confirmation hearings.

So a few years ago, when Justice Kagan was nominated to the Supreme Court, Professor Rick Pildes wrote a blog post [Rick Pildes, *Elena Kagan's Legal Experience*, Balkinization Blog (May 14, 2010, 2:37 PM), http://balkin.blogspot.com/2010/05/elena-kagans-legal-experience.html (last visited June 6, 2013)] touting the relevance of her prior White House experience back in the Clinton Administration. No surprise, I agree with that analysis. White House experience of that kind gives one extraordinary insight into the legislative process, the administrative process. You learn how the President and the presidency operates in a way that people on the outside I don't think can fully appreciate, even people who work at agencies. It gives you great respect for the presidency, but that does not translate into undue deference.

Serious White House experience gives you some perspectives that might be thought counterintuitive. For one, White House experience really helps refine what one might call one's B.S. detector for determining when the executive branch might be exaggerating or misstating how things actually work or the problems that would supposedly ensue from a particular legal interpretation. Prior White House experience, I think, is also important and can be helpful to show some backbone and fortitude in those cases where the independent judiciary has to stand up to the presidency and not be intimidated by the mystique of the presidency. I think of Justice Jackson, of course, as a rough role model for us executive-branch lawyers turned judges. We all walk in the long shadow of Justice Jackson.

When people ask me which prior legal experience has been most useful for me as a judge, I tell them I certainly draw on all of them, the clerkships, private practice at Kirkland, Independent Counsel's office, even college jobs on the Hill at Ways and Means, but the five-and-a-half years in the White House, especially the three years as Staff Secretary for

President Bush, are among the most interesting and most instructive, and so many memories come to mind and I think about so often.

I remember walking into the West Wing for the daily 8:10 counsel's office meeting on September 12th, 2001, and how much different that felt from going in just 24 hours earlier. I remember, as staff secretary, witnessing the President's meetings and discussion with world leaders, President Putin and President Musharraf and President Karzai and Prime Minister Blair and Pope John Paul.

Being at the G8 meeting in Scotland on 7-7-05 when the London bombings occurred; participating in the process of putting legislation together, whether it was Medicare, prescription-drug or terrorism insurance, immigration-reform attempts.

Times at the Hill in the middle of the night, the last-minute negotiation sessions with the ritual and required yelling matches among congressional staffers who were sleep deprived; drafting executive orders; working on presidential speeches; and when you see regulatory agencies screw up on occasion—gather that still happens on occasion.

I saw how agencies try to comply with Congressional mandates. I also saw how agencies sometimes try to avoid Congressional mandates; saw the relationship and odd dances between the agencies and the White House. I saw the good and bad sides of a President trying to run for President and be President at the same time.

I met Americans from all over the country, all of us did who worked there as we traveled, families of fallen soldiers and small-business owners and farmers and cops and new immigrants. I talked to the President and was able to participate in how should he pick someone for the Supreme Court.

I remember a few days after Hurricane Katrina, easily the worst week that all of us experienced working in the White House, and late that Saturday night sitting on my couch when Dan Bartlett, the communications director, called and said simply, "Rehnquist died; boss wants to meet at 7:00 o'clock tomorrow morning." And I sat on my couch at home just thinking about the enormity of all of that.

It was not apparent to me at the time, and I am certainly not disinterested, but it seems to me those experiences helped make me a better student of the administrative process, a better interpreter of statutes.

Now appellate judge, completely different, as far away, as I mentioned, as you can be from the frenzied, emotional, chaotic world of the White House staffer. I have been on the DC Circuit for seven years now, and after seven years I can end the suspense and say that FERC [Federal Energy Regulatory Commission] cases are still FERC cases. (*Laughter*)

But it is a huge honor, and it is a huge responsibility, and I know it has real-world consequences for the lives and liberties and property of the American people, and so, in the spirit of bench and bar interaction, I

thought I would touch briefly on three ideas, three issues that the combination of my experiences in the White House and the combination of my experiences as a judge have led me to think that judges and practitioners and academics should be thinking about. And the connective tissue to these three ideas is to help establish firmer ground rules for particular legal endeavors before those rules are applied in particular cases, a basic, as we all know, rule-of-law value and also something that helps avoid the partisan and ideological squabble that can occur when you are trying to create the rule at the time it is being applied.

So first, at least by the time the next presidency gets going, I think the confirmation process for federal court-of-appeals and district-court judges should be fixed so that it provides for a vote within a set period of time. Why do I think that?

When I worked at the White House, I worked on judicial nominations, and the breakdown in the Senate confirmation process for lower-court nominees was really in full force at that time. Nominees were held up for years without hearings or votes. Of course, much the same thing had occurred in the Clinton Administration, and some of the same thing is occurring now in the Obama Administration.

I think about the examples of John Roberts and Elena Kagan and their stalled nominations to the DC Circuit. It was easier for them to get confirmed to the Supreme Court than to get confirmed for a lower court. That is crazy, but it is true.

So the process for lower-court nominees is too drawn out, and the delays are not right to the individual nominees, and that creates systemic effects. It deters good people from wanting to be judges. Who wants to have their private practice held up for a year or two and lose clients while they are facing an uncertain Senate confirmation process?

The dysfunction means that seats are vacant too long, meaning that courts are overburdened. This causes delays in our system of justice. There is a better way. As President Clinton and President Bush both suggested, and President Bush talked about in some detail in various speeches, the executive branch and Senate should work together on ground rules that will apply no matter who is President and who controls the Senate; in other words, Democratic President, same rules as Republican President; Democratic-controlled Senate, same rules as Republican-controlled Senate. There are four permutations. The rules should be the same for all four permutations.

So my starting suggestion would be that the Senate should require a vote on all judicial nominees within six months of nomination. It is not my place to say whether that should be a 60-vote requirement or a 51 majority-vote requirement, but I do think that a time limit is essential to bring to a close the process of a nomination of a federal judge. It will help fill vacancies more quickly. It will help encourage more good people to become part of the judiciary, which the judiciary needs.

I do not want to inject myself into current events, and I realize changing the rules in the middle of a presidency is sometimes difficult because incentives are skewed by how the new rules would apply, but at least by the time the next presidency gets going, it is time for the executive branch and the Senate to work together to bring some regularity to this process.

Second, most of the challenging legal issues today are questions of statutory interpretation, so we should work hard to ensure that the ground rules of statutory interpretation are as clear as possible before we must apply them in the context of controversial litigation.

Now in our court, the bread and butter is to figure out whether an agency exceeded its statutory authority or statutory limits. The most important factor is the precise wording of the statutory text. If you sat in our courtroom for a week or two and heard case after case, and I don't advise that for anyone who wants to stay sane, but if you did that, you would hear judges across the ideological spectrum asking, "What does the text of the statute say? What does the text of the regulation say?"

Now this is in large part attributable to the influence of Justice Scalia on statutory interpretation, but it is also because both formalists and functionalists alike have come to realize the centrality of text to statutory interpretation.

Functionalists recognize something I saw repeatedly in the White House, that virtually all important legislation is a compromise of many competing views, and we upset that compromise when we do not follow the text. Professor John Manning of Harvard has done landmark work on that precise point.

But to say that the text is important, which all judges agree on, to say that it is important or it is primary still leaves a number of questions how best to interpret the text. There are canons of interpretation, some that are semantic canons, the canon against surplusage or the *ejusdem generis* canon. There are the substantive canons, such as the constitutional-avoidance canon or the presumption against extraterritorial application.

These canons of interpretation are hugely important to day-to-day statutory interpretation. Just like a few weeks ago, a huge Alien Tort Statute [28 U.S.C. § 1350] case [Kiobel v. Royal Dutch Petroleum Co., ___ U.S. ___, 133 S. Ct. 1659 (2013)], it came down to how do you apply the presumption against extraterritorial application?

Or consider the constitutional-avoidance canon. Most people think that the main disagreement in the healthcare cases between Chief Justice Roberts and the dissenters was on the question whether the tax clause justified the individual mandate. But if you actually look at the opinion [National Federation of Independent Business v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566 (2012)], Chief Justice Roberts agreed with the dissenters that the individual mandate provision as written was not justified by the tax clause, but the Chief Justice went on and said that the statute could be construed not to impose a mandate but rather just a traditional tax incentive of the

kind we have with cigarette taxes and mortgage-interest deductions and the like.

He relied on what? The constitutional-avoidance doctrine, to interpret the individual mandate that way, and the dissenters disagreed that the constitutional-avoidance doctrine could be used to stretch the statute so far from its terms.

For all the ink that has been spilled about the healthcare cases, very few people seem to appreciate the source of the main disagreement between the Chief Justice and the dissenters: how to apply the constitutional-avoidance doctrine.

It is, of course, better when the ground rules of statutory interpretation are fully settled ahead of time, and I want to quote someone who lamented the lack of accepted ground rules to interpret statutes. He said that statutory interpretation "involves inconsistent practices" on a variety of vexing questions [25 A.L.I. Proc. 10 (1948)], including—and he listed many—including "[h]ow far will we go to construe a law . . . to avoid raising a constitutional question?" [25 A.L.I. Proc. at 11.] And that man continued: "[I]t would help . . . if we could have general acceptance by the Bench as well as the Bar of a few basic principles of statutory construction." [25 A.L.I. Proc. at 15.] Perhaps this Institute, he said, "could devise a disinterested Restatement that would commend itself as an acceptable standard for enactment by Congress, or for application by the Courts." And that was Justice Jackson speaking to The American Law Institute in Washington, DC, in May 1948. [Robert H. Jackson, Associate Justice of the Supreme Court of the United States, "The Meaning of Statutes," Address Before The American Law Institute (May 20, 1948), revised version in 34 ABA J. 535 (July 1948).]

And the void identified by Justice Jackson persisted for decades and decades thereafter, and it has been filled well now, but only recently, by Justice Scalia and Bryan Garner in their book last year called *Reading Law* [: *The Interpretation of Legal Texts*], a book that really should be on the shelf of every judge and every lawyer. Their extraordinary work identifies and explains 57 canons of construction.

Now this is probably obvious, but their views about how some of those canons should be applied were bound to be contested, and they have been contested as to some. Professor Bill Eskridge's recent piece in the *Columbia Law Review* [William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 Columbia L. Rev. 531 (2013) (book review)] questions a few of the canons' application as discussed by Justice Scalia and Professor Garner.

And in very important new scholarship, Professor Abbe Gluck of Yale Law School has pointed out that congressional drafters are attuned to some of the canons identified by Justice Scalia and Mr. Garner but not to others. [Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpreta-*

tion from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901 (2013).]

To take one example, courts often apply a surplusage canon that words in a statute should not be interpreted to be redundant. It turns out that members of Congress want to be redundant. Redundancy, in the words of Shakespeare, helps a speaker to make double sure. In plain English, we often use redundant words to be sure and leave no doubt.

Extra credit for those who got the joke there. Anyway. (*Laughter*)

And beyond that, congressional drafters often purposely use redundant terms to make sure that all bases are covered, to satisfy interest groups and executive officials. So why do courts continue to use the surplusage canon? Good question.

But those examples, those questions are why I think people in this room can make a difference, either individually or as part of this Institute. Justice Scalia and Bryan Garner have helped fill the void identified by Justice Jackson to this group in 1948.

To the extent there are lingering questions about certain canons, we should all endeavor to continue the dialogue and reach greater consensus over time. Justice Jackson said that this issue "is worthy of any effort you might deem proper to make its eventual solution more likely and more immediate." [25 A.L.I. Proc. at 16.] I agree, so I would say let's keep working to make the ground rules for statutory interpretation as clear as we can.

My third and final point relates to war. In wartime, as in judicial confirmations, as in statutory interpretation, our system should endeavor to ensure that the legal ground rules are as clear as possible ahead of time. Perhaps the most significant cases that come before our court, before any court, are those that involve the national security and foreign policy of the United States.

In many cases, however, the question really boils down to has the executive branch acted consistently with a statute, and the courts have an important role in those cases, as the Supreme Court has made clear from *Youngstown* [Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)] and *Boumediene* [Boumediene v. Bush, 553 U.S. 723 (2008)] to a decision on the political-question doctrine a year ago in *Zivotofsky* [Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. ___, 132 S. Ct. 1421 (2012)].

Some, of course, have argued that even if the courts are involved, there should be extreme deference to the executive. But at least in cases where statutes are involved and there is a plaintiff with standing, excessive deference to the executive actually means overriding the will of Congress, something that was recognized by the court in *Zivotofsky*. And therefore it would upset the balance of powers among the branches for a court to simply give a blank check to the executive in those cases. That is the lesson of Justice Jackson's opinion in *Youngstown*. It is the lesson of the Su-

preme Court's 2006 decision in *Hamdan* [Hamdan v. Rumsfeld, 548 U.S. 557 (2006)]. Courts generally apply ordinary principles of statutory interpretation even in wartime cases.

What this means, obviously, is that statutes are very important to the executive's wartime decisions, something Professor Jack Goldsmith at Harvard has pointed out. Contrary to the common belief, or some common belief, statutes really are prevalent in regulating various aspects of war, from detention to interrogation to surveillance to military commissions.

And given that wartime decisions are life or death, it is especially important in this area for Congress to write the rules clearly and to update them to make them more clear when necessary, and then for courts to interpret the laws according to settled and consistent principles of interpretation. It is not always possible, obviously, to achieve that objective on all fronts, but it is certainly possible to try, and all of us who have roles in the legal system should be working to that end.

So in closing, having mentioned war and knowing this is The American Law Institute, we don't dwell on it, but we are a nation at war, with great challenges for the legal system. When I worked at the White House, I saw the difficulty of the job of President, who has a particularly important role, obviously, in wartime. I am aware of that responsibility and the burden that comes with it.

Before his 2004 address at the nominating convention in New York, President Bush was doing a last run-through that afternoon in the hotel room of his speech. As I recall, there were few people in the room—Mike Gerson, Dan Bartlett, myself—and the speech was pretty well locked down. The President was just doing a last practice run to make sure everything was exactly as he wanted it, and we were all reading our drafts on paper as he was reading it out loud.

And anyway, towards the end of the speech there was a passage that read as follows: "I've held the children of the fallen, who are told their dad or mom is a hero, but would rather just have their dad or mom. I've met with parents and wives and husbands who have received a folded flag, and said a final good-bye to a soldier they loved."

And as President Bush finished reading that sentence in the hotel room, there was a pause, and after a few seconds, I looked up, all of us did, as we were reading the speech, and President Bush had stopped because he was choking up, and, of course, being President Bush, he immediately said, "Don't worry, I'll get it, I'll straighten it out tonight."

But in that moment and in so many others, I remember thinking of the enormity of the responsibility the President carries. I always think of that when I observe President Bush, and I always think of that when I observe President Obama. I thought of that in Dallas, a few weeks ago,

when I saw five Presidents, the five living Presidents on a stage at the Bush Library, so seeing that, I will think always that what unites us in America is far greater than what divides us.

Thank you. (*Applause*)