Courts must consider the traditions of their own nations in interpreting their respective constitutions. Still, the experience of other nations may be instructive. As Your Highness wrote in this context,

"The law must develop and grow. We should not be insular but expand our horizon by looking at case law of other common law jurisdictions as well. We should then adopt what is most suitable to us in the Malaysian context." *(Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches, 2004)*

Justice Anthony Kennedy
Written Constitutions and the Common Law Tradition
20th Sultan Azlan Shah Law Lecture, 2006

The Right Honourable Justice Anthony Kennedy

Written Constitutions and the Common Law Tradition

Anthony McLeod Kennedy
(b. 23 July 1936*)*

Widely viewed by conservatives and liberals alike as balanced and fair, Justice Anthony Kennedy was sworn in as an Associate Justice of the United States Supreme Court on 18 February 1988, upon President Ronald Reagan's nomination.

His appointment to his current judicial office would appear to have been charted from his youth. Born in central California in 1936 to Anthony J Kennedy, a respected private legal practitioner, and Gladys McLeod Kennedy, a leader in Sacramento civic activities, Justice Kennedy was exposed early in his life to the workings of the law: at age eleven, he worked after school for the state Senate as a page boy; later on he spent time in his father's law office proofreading wills and accompanying his father at counsel table while Kennedy Senior tried cases.

After attending public school in Sacramento, Justice Kennedy went on to obtain his BA from Stanford University and the London School of Economics, and his LLB from Harvard Law School.

Justice Kennedy then went to work for a private law firm in San Francisco. His father unexpectedly died in 1963 and Kennedy returned to Sacramento to run his father's law firm, a post he held for the next 12 years. He also served as a Professor of Constitutional Law at the McGeorge School of Law of the University of the Pacific from 1965–1988.

At the age of 38, when he was appointed to the Court of Appeals in 1975, Justice Kennedy was one of the youngest in the history to be appointed as a federal appellate judge in the United States. In 1988, he was unanimously voted by the Senate to the Supreme Court.

Through the opinions he has held in the cases that have come before him, Justice Kennedy has gained a reputation as a judge who is conservative but not confrontational, able to build bridges to more liberal judges. Justice Kennedy has played a pivotal role in some important decisions of the Supreme Court.

Some landmark decisions

As a Justice of the United States Supreme Court, Justice Kennedy has participated in, and delivered the majority opinion of the Supreme Court in many landmark cases in recent years, involving novel and important aspects of the law, including constitutional law, due process, personal liberty, administration of justice, right to life, discrimination, and affirmative action just to name a few.

Rights of suspected terrorists

In *Boumediene v Bush* (2008), Justice Kennedy, writing the majority opinion of the Supreme Court, found that the constitutionally guaranteed right of habeas corpus applied even to persons held in Guantanamo Bay on suspicion of terrorism, holding that suspension of that right under the Military Commissions Act of 2006 was unconstitutional. Justice Kennedy pointed out that there may be times where the courts may have to abstain from "questions involving formal sovereignty and territorial governance … [but to] hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.' *Marbury v Madison* (1803)."

In the same case, in dealing expressly with terrorist threats, Justice Kennedy observed:

> The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur. Certain principles are apparent, however. Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus. The cases and our tradition reflect this precept. …
>
> Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary

as the responsibility to hear challenges to the authority of the Executive to imprison a person.

Justice Kennedy also participated in other landmark Supreme Court cases dealing with the rights of detainees in Guantanamo Bay such as *Rasul v Bush* (2004), *Hamdi v Rumsfeld* (2004), and *Hamdan v Rumsfeld* (2006).

Administration of criminal justice

In the area of administration of criminal justice, Justice Kennedy has been consistently an advocate of rights of prisoners and other offenders, most notably in cases involving juvenile offenders and also overcrowding prisons.

Juvenile offenders: death penalty and life imprisonment without parole

The constitutionality of the death penalty for juvenile offenders was considered by the Supreme Court in *Roper v Simmons* (2005) (a case referred to by Justice Kennedy in the Twentieth Sultan Azlan Shah Law Lecture). Justice Kennedy, writing the majority opinion, ruled that it was unconstitutional to impose the death penalty on juvenile offenders.

Justice Kennedy once again wrote the majority opinion of the Supreme Court in *Graham v Florida* (2010), ruling that the Constitution did not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime. In this case, Justice Kennedy meticulously analysed the general principles of criminal sentencing, considered earlier decisions of the Supreme Court on the issue, including *Roper v Simmons*, before making references to the international opinions and principles adopted by other countries in dealing with a similar issue. He then poignantly pointed out:

There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over …

The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual. See, eg, [*Roper v Simmons*] … Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question. …

The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, "the overwhelming weight of international opinion against" life without parole for non homicide offenses committed by juveniles "provide[s] respected and significant confirmation for our own conclusions." *Roper*, supra, at 578.

Overcrowded prisons

In *Brown v Plata* (2011) the Supreme Court considered the effect of overcrowding of prisons in the State of California, ruling that "[c]onditions in California's overcrowded prisons are so bad that they violate the Eighth Amendment's ban on cruel and unusual punishment", and ordered the State to reduce its prison population by more than 30,000 inmates. Justice Kennedy, writing for the majority, described such a prison system which failed to deliver minimal care to prisoners with serious medical and mental health problems as producing "needless suffering and death". The majority opinion included photographs of inmates crowded into open gymnasium-style rooms and what Justice Kennedy described as "telephone-booth-sized cages without toilets" used to house suicidal inmates, and highlighted that suicide rates in the State's prisons have been 80 percent higher than the average for inmates nationwide (*The New York Times*).

Privacy and freedom of speech: "pure speech and commercial speech"

Justice Kennedy is a fervent supporter of the right to privacy and freedom of speech. As he observed in the recent case of *Sorrell v IMS Health Inc* (2011), "Privacy is a concept too integral to the person and a right too essential to freedom to allow its manipulation to support just those ideas the government prefers."

Justice Kennedy has participated in numerous Supreme Court cases involving the validity of regulations affecting internet and broadcasting, such as *Ashcroft v ACLU* (2004), *Turner Broadcasting v Federal Communications Commission* (1997) and the *AT&T cases* involving the interpretation of provisions of the Freedom of Information Act: *Talk America Inc v Michigan Bell Telephone Co* (2011) and *FCC v AT&T Inc* (2011).

Justice Kennedy also participated in the case of *Citizens United v Federal Elections Commission* (2010), which is perhaps the most important recent decision of the Supreme Court dealing with issues of freedom of speech, election funding and information in the context of corporations. On political speech, Justice Kennedy observed:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. … The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." … For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. … We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers …

Justice Kennedy then pointed out that even a corporation had the same right to political speech:

> Under the rationale of these precedents, political speech does not lose First Amendment protection "simply because its source is a corporation" ... The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons."…

The following observations made by Justice Kennedy in his opinion in *Citizens United* on the changes in "speech dynamic" are noteworthy:

> With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred …
>
> When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves …
>
> Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle. Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials. …

On new forms and forums in relation to speech, Justice Kennedy added:

> Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues … The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech. …
>
> Governments are often hostile to speech … "Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it." [*McConnell v Federal Election Commission* 540 US 93], at 341 (opinion of Kennedy J).

Comparative law and constitutional interpretation

Justice Kennedy recognises the importance of comparative law in the interpretation of the Constitution of the United States, often making reference to common law developments, and to other international opinions and conventions in his opinions, as can be seen for example in the cases of *Boumediene v Bush* (2008), *Roper v Simmons* (2005) and *Alden v Maine* (1999). However, in *Graham v Florida* (2010), he observed that in so doing "[t]he judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But '[t]he climate of international opinion concerning the acceptability of a particular punishment' is also 'not irrelevant'."

Non-judicial involvements

Justice Kennedy wrote and created the framework for the *Trial of Hamlet*, a mock trial where forensic psychiatrists testify regarding Hamlet's criminal responsibility, and the jury renders a verdict. Justice Kennedy performed it for the Shakespeare Society in Washington, DC; for the Boston Bar Association in Boston, Massachusetts; for the Chicago Humanities Festival in Chicago, Illinois; and more recently in 2011 for the Shakespeare Center of Los Angeles.

Justice Kennedy has lectured in law schools and universities throughout the United States and has visited and lectured at over 125 different universities. In addition to teaching students, he has given lectures in teaching methods to law professors. He has also taught at universities in other parts of the world, particularly in China, where he is a frequent visitor. Some of his lectures to groups in China have been disseminated throughout that country. He is a member of the Asian Law Initiative of the American Bar Association. Beginning in 1986, he has taught each year at the University of Salzburg, Austria. The course, entitled *Fundamental Rights in Europe and the United States*, has attracted students from throughout the United States, Europe, and other countries.

Justice Kennedy also served on the board of the Federal Judicial Center and on two committees of the US Judicial Conference. In response to a keynote address to the American Bar Association, the ABA convened the Kennedy Commission on Criminal Justice. That Commission issued a comprehensive report and remains active in proposing changes in the areas of corrections and rehabilitation. Justice Kennedy is a member of the United Nations Commission on the Empowerment of the Poor.

He and his wife, Mary, who is also a native of Sacramento, California, have three children.

The Rule of Law requires fidelity to the following principles:

1 The Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all its officials.

2 The Law must respect and preserve the dignity, equality, and human rights of all persons. To these ends the Law must establish and safeguard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them.

3 The Law must devise and maintain systems to advise all persons of their rights, and it must empower them to fulfil just expectations and seek redress of grievances without fear of penalty or retaliation.

20

Written Constitutions and the Common Law Tradition

Justice Anthony Kennedy
Supreme Court of the United States

Text of the Twentieth Sultan Azlan Shah Law Lecture delivered on 10 August 2006 in the presence of His Royal Highness Sultan Azlan Shah.

Your Royal Highness Sultan Azlan Shah; Your Royal Highness Sultan Idris; Your Royal Highness the Crown Prince; and my fellow citizens of a world still in search of better understanding through the Rule of Law.

Thank you for inviting me to deliver the Sultan Azlan Shah Law Lecture. For the last 20 years jurists and academics have come to Malaysia to address the state of the law and its progress. It is an honour to contribute to this outstanding lecture series in your nation, which is committed to a written constitution and the rights it guarantees to all of your citizens.

The continuance of this lecture series is a tribute to His Royal Highness Sultan Azlan Shah's steadfast commitment to the Rule of Law. The distinguished way you discharged your duties to the judiciary, Your Royal Highness, and the evident purpose in your life and thought

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to preserve and ennoble the law confirm the resolve of those who still serve on the Bench. Your example and your friendship inspire us to rededicate ourselves to the law and its promise. Thank you for your sponsorship, your gracious welcome, and for the honour you and your family and His Royal Highness Sultan Idris confer by being in attendance here today.

It is a pleasure, too, to express our warm thanks to Dr Visu Sinnadurai for extending the invitation to deliver this lecture and to visit your country. Dr Visu's own respect for the law and his wise and gentle counsel are a tribute to your nation and its people. Thank you so much, Dr Visu, for your many courtesies to all of us.

As the first American to have the privilege to participate in this lecture series, it seems to me appropriate to discuss my own country's approach to a difficult challenge in the law: how a judiciary should interpret a written constitution to preserve its original promise and structure in the context of inevitable changes taking place over time. My thesis is that the American courts could not have discharged this responsibility were it not for their own training and background in the common law, its substance, its processes, and its traditions.

It must be clear at the outset that a decision interpreting a constitutional provision has consequences quite different from a decision interpreting or elaborating the common law. Legislatures can change common

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law precedents in the ordinary course but do not have this latitude with respect to constitutional decisions. So judges must find and respect special constraints when they turn to constitutional adjudication. Not the least of those constraints is the special care that must be taken to ensure that the constitutional text and its purpose are the framework for the inquiry.

My object here is not to explore and define those constraints in detail, other than to note that this whole subject has been one of absorbing interest in America since the founding of our Republic. My more narrow thesis today is to say that, assuming those constraints can and will be expressed and explored by the courts as part of the on-going process of discerning our Constitution and its meaning, the common law method, or, to be more precise, an analogue of the common law method, has proven, in the history and tradition of our Court, to be instructive, and often necessary, when we interpret our written constitution, the Constitution of the United States.

The common law tradition and constitutional development

Let us begin with the English common law tradition that was transmitted to our two countries as well as to other nations that sought to establish a legal system that could guide their judges and be accepted as just by their people.

It is our human destiny
to venture beyond
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It is our destiny
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It is our destiny
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It is our human destiny to venture beyond what we know. It is our destiny to strive to touch what once might have seemed beyond reach. It is our destiny to learn and then to teach. These were the forces driving the common law as it emerged from the doubts and obscurities of ancient times to define legal principles and a legal process.

The common law had to emerge from the tensions, the dualities that are always part of the human experience: the dualities of ignorance and insight; malice and magnanimity; recognition of human limitations and the human instinct and determination to find new truths.

Beyond these dualities common to human experience then and now, the work of elaborating the law was difficult when the world of thought was constrained by other dualities that, considered in present terms of reference, would all but blind any real clarity of vision; for in ancient times superstitions held sway where science and rationality now seek to come forward.

Our predecessors in the law commenced their work when the world of thought had yet to confront dualities that today are known and understood, even if not resolved. Among these were the distinctions, or the lack of all distinction, between superstition and psychology; between physics and folklore; between magic and medicine; between the laws of God accepted by faith and the laws of natural phenomena that can be demonstrated. All these were barriers to clarity of thought and accuracy of judgment.

> The essential role courts play in illuminating our constant search for the meaning of justice is more than a source of professional pride. It can be defended on grounds that **it is society's way of searching for justice.**

Still, beginning at least from the time of King Henry II of England, judges began to give reasons for their decisions. By doing so they could strive to convince the litigants that their case had been decided in a neutral way and by neutral principles. From this process stability and consistency emerged when the decision, and any later resulting general principle, proved sound. Thus did the common law seek to find its own meaning; thus did it seek to discover itself.

And so the law proceeded case by case to explain our own behaviour and to build upon what is honourable in human striving and motivation. Down through the centuries the law sought to define concepts of guilt, negligence, and damages. As a result, consideration and performance in contracts, fault and causation in torts, and the proper measure of damages for different causes of action had been explained and elaborated in considerable detail by the mid-part of the 18th century. When the common law seemed to stall, or become captive to its fictions, the legislative power stepped in, as in the case of statutes that were necessary to define the crime of embezzlement.

The 18th century saw consolidation of this process of explanation and synthesis with the entry on stage of an important writer in the law and with the culmination of a profound philosophical influence. The writer was Blackstone. Whatever doubts there were about a now-complex common law that could present difficulties even to its judges, Blackstone's synthesis demonstrated a remarkable degree of coherence in common law doctrines and their

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suitability for an ever more sophisticated world of trade and manufacturing. *Blackstone's Commentaries* demonstrated that common law can make common sense. The author had a wide readership in the American colonies. In the late part of the 18th century sales of *Blackstone* in America were second only to those of the Bible. In an age that drafted constitutions, including the Polish Constitution in 1791 and then the Napoleonic Code in 1804, publication of the Commentaries might have counselled against any grand undertaking to codify the common law.

The philosophic influence, dating before Blackstone and comprising a far larger universe than the law and its commentaries, was the expansive thought of the Enlightenment. Eighteenth century statesmen considered themselves to be the beneficiaries of Enlightenment thought. When Isaac Newton, a century before the American constitutional convention in Philadelphia, explained the law of gravity, he kept in motion the idea that humankind might define and set forth the laws of the natural universe. The Americans asked why stop there? Why not define as well the principles of good government?

When the framers of the Constitution met in Philadelphia, the Enlightenment had emboldened them with a newfound confidence that freedom could be more secure if government existed by conscious design. If the common law courts, working through centuries of doubt and superstition, could devise a framework with a rational order, as set out in so substantial a way by Blackstone,

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[1] *McCulloch v Maryland* 4 Wheat. 316, 415 (1819).

how much more successful could the Americans be if the Constitution provided a rational structure at the outset? With constitutions, just as with the common law, consistency and a just order could be sought by rational inquiry and discourse.

While the common law provided cause for optimism in the enterprise of establishing a law that binds the government and gives rights to the person to challenge arbitrary official action, it taught another lesson. It taught this warning: Do not try to impose a legal system with rules so detailed and precise that they do not allow the system to learn from human experience. As John Marshall, the great American Chief Justice, observed in one of the first leading decisions interpreting the new charter: A constitution is "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." [1]

The crises of human affairs, or, to be less dramatic, the rules for resolving a simple quarrel between two litigants, cannot be predicted with complete accuracy. So, too, a constitution that seeks to provide a detailed set of answers risks mistake and the consequent loss of confidence among the people.

When they wrote the Constitution and the Bill of Rights the framers used inspiring, resounding phrases, but phrases often of generality, not narrow, specific meaning. The Constitution, with but little elaboration, addresses freedom of speech and freedom of the press; the right of

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the people to be secure against unreasonable searches and seizures; and the right not to be deprived of life, liberty, or property without due process of law.

If the framers had presumed to know each and every precept for a just society, they would have been more specific. They were not so brazen. They were more modest, more thoughtful, more respectful of the precept that to err is human. They knew that any one generation, including their own, can be blind to the persisting injustices, the prejudices, the inequalities of its own time. The whole idea of a constitution is to allow each succeeding generation to rise above the inequities obscure to those who first adopt it.

What then was the means of keeping a constitution? One mechanism to evolve was judicial interpretation, a process subject to debate, skepticism, and sometimes ridicule, at the beginning even as now. Its detractors notwithstanding, the process has served us well. It is the basis not only for resolving disputes but also for teaching the meaning of freedom.

The framers were well aware of the possibility that some judges could be hostile to liberty. The Declaration of Independence, after all, gave as one justification for the Revolution the oppression of tyrannical judges. Despite this, the framers provided not just for a judiciary but a judiciary with life tenure. They were convinced from their common law experience that an independent judiciary was essential for constitutional government.

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As the Marshall Court and the Supreme Court in the decades that followed began to develop doctrines of constitutional interpretation, our understanding of constitutional dynamics progressed. In tandem with an increasing awareness of the judicial power in constitutional interpretation, the common law in the mid-19th century was coming to a new awareness of the sources and foundations for its own rules. There was now a clear recognition that reason and sound policy, not blind adherence to unarticulated premises, were the surest source of law.

Oliver Wendell Holmes Jr was one of the most gifted participants in this process. He wrote:

> The truth is that law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.

In commenting on the judicial process, Holmes made this further remark:

> The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, consideration of what is expedient for the community concerned.

As John Marshall, the great American Chief Justice, observed in one of the first leading decisions interpreting the new charter: A constitution is "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."

Holmes was surely right to point out that we must articulate our premises. His observations taught generations of judges and commentators to do just that. His constant tendency to suggest that expedience is the foundation for wise policy seems to me a too limited and constrained interpretation of the principles and moral underpinnings that guided the framers. That discussion can be left for another time. The point here is that the reasons animating a judicial decision can and must be explained.

In a non-constitutional case the safeguard that the common law judge has in knowing that a wrong decision or unsound rule can be corrected by legislative action is welcomed, not resented, by the judge. Let there be no mistake about this: a judge who knows a legislature can change a rule has a sense of confidence, of reassurance, of satisfaction, in knowing that the judgment of the court will not be binding for future cases if a legislature chooses to change it. That reassurance is not present in cases involving constitutional interpretation. In constitutional cases a judge must make doubly sure that a sound policy is justified by the constitutional text, prior cases, and the well-accepted principles and traditions of the people.

By relying on the reasoning of prior cases, courts engage in principled decision-making and draw upon the accumulated knowledge and insight of dedicated jurists who have confronted similar questions. In *Calvin's Case*, a seminal English decision from 1608, Lord Edward Coke made this observation on the utility of the case law process:

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> [T]he laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience (the trial of light and truth) fined and refined, which no one man (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto.

The common law method depends upon our knowledge of the customs and traditions of our people. And a constitution survives over time because the people share a common, historic commitment to certain simple but fundamental principles that preserve their freedom.

The common law method in constitutional interpretation

Let us now turn to constitutional interpretation and to two illustrations of its reliance on the common law method.

The Fourth Amendment guarantees the right of the people to be secure in their homes against unreasonable searches and seizures. By their considered choice of the term "unreasonable", the framers must have anticipated that its meaning could be apparent only over the course of time; and they must have intended that the judiciary would elaborate the meaning of the provision from case to case.

The Supreme Court of the United States, like so many other courts in our system, has devoted substantial time

> The whole idea of a constitution is to allow each succeeding generation to rise above the inequities obscure to those who first adopt it.

[2] 126 S. Ct. 1515 (2006).

and resources to interpreting the Amendment. In just the last two decades the Supreme Court has decided over 60 search and seizure cases. The case-by-case methodology of the common law, borrowed by the courts for constitutional interpretation, is a limit on the discretion of the judges. We do not start from square one each time we consider a question. Instead, we must consider how the basic principle has been embodied and elaborated in our whole long tradition.

As you well know, one of the recurring fascinations of the case law method is that lawyers and judges sometimes find that what appears to be a simple, fundamental, straightforward question has not been answered by a decided case—not last year, not last decade, not for the last 200 years. This was the problem the Court confronted last term in *Georgia v Randolph*.[2]

The issue was a simple one. It is well established that police may search a home if they have consent of the occupant to do so. What happens, though, if two occupants are present and one consents to the police entry but the other objects? The background, an all too familiar prelude for many legal disputes, was a troubled marriage. Scott Randolph had been living with his wife, Janet Randolph; but she left their home for several months, taking the couple's young son with her. Later she returned. After an argument, Scott Randolph left the house with the child. Janet Randolph called the police. Upon their arrival, she told them of her concerns for the boy and added that her

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husband was a cocaine user. As the wife was talking with the police, the husband came back to the house. (The child had been left with friends.)

Confronted with the allegations by the wife that the husband used cocaine, the husband denied wrongdoing. Indeed, he countered by saying his wife abused drugs and alcohol. At that point, Janet Randolph volunteered that "items of drug evidence" were inside the house. An officer asked the husband for permission to enter. He unequivocally said no. The officer asked the wife; she consented; the officer entered. He found evidence of cocaine use. Based on the discovery, the officer obtained a warrant to search the house. The warrant-based search disclosed further evidence of drug possession and use. The State of Georgia charged the husband with drug offenses. The issue was whether the evidence was admissible at trial.

Two background rules were clear. First, if a warrant is issued based on evidence obtained earlier in an illegal entry, the warrant is defective, and, as a general matter, cannot support a later search. Second, if an entry is based on consent, the entry is lawful. So we come to the basic question: Suppose the wife consents to police entry but the husband, who is also present, does not. May the officers enter? Or is this a correct statement of the issue? Is it a better formulation to ask about co-occupants or co-tenants, comprising a larger definitional set than husband and wife? Does it really make a difference that the occupants are married? All of the Justices framed the issue not in terms of husband vs wife but rather as co-occupant vs co-occupant.

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Perhaps you are interested to know the outcome. In a 5-4 decision, the Court held that, at least in these circumstances, the objection of an occupant who is present overrides the consent of the co-occupant. So there was no valid consent for the initial police entry. The state court, which had reached the same conclusion and ordered the evidence suppressed, was affirmed.

The decision to focus on the relation between occupants of the home, and not the narrower subset of husband and wife, was not discussed by the Court. The underlying premise seems to be that if a co-tenant who is not married can foreclose police entry by withholding consent, the right of a married person to object should be no less.

Perhaps you are thinking that the term "occupant" is somewhat imprecise for such an important inquiry. Should we not talk in terms of co-lessors or co-tenants? If we did, would we not find in the law many precedents instructing us regarding conflicting rights and duties when co-tenants or co-lessors disagree about how the property is to be used? The Court did not attempt to rely upon these cases. It concluded the Fourth Amendment interest here is defined as a societal expectation of privacy.

Why is it, both in the case of a common law dispute and a constitutional adjudication, that we rely on judges to state what societal expectations are? Are not judges sometimes among the more cloistered, even reclusive, members of

Let there be no mistake about this:
a judge who knows a legislature
can change a rule has a sense of confidence,
of reassurance, of satisfaction,
in knowing that the judgment
of the court will not be binding
for future cases if a legislature
chooses to change it.
That reassurance is not present in cases
involving constitutional interpretation.

In constitutional cases
a judge must make
doubly sure that
a sound policy is justified
by the constitutional text,
prior cases, and
the well-accepted
principles and traditions
of the people.

[3] *Georgia v Randolph* 126 S. Ct. 1515 (2006), at 1521–1522.

[4] Ibid, at 1522–1523.

our society? There are various answers, it seems. To some extent the judges' conclusions are descriptive, that is to say descriptive of a prevailing norm. The judges are not relying upon their personal experiences. The judges are framing an objective definition of a prevailing norm based on data and arguments presented by counsel and the contending parties. Judges give reasons for their decisions, so there is clarity. Judges give the reasons in the same mode of analysis over time, so there is consistency. A ruling as to the contours of the societal norm, furthermore, is not entirely descriptive. It is normative as well. The Court, again instructed by arguments and contentions of the members of its bar, reaches a judgment respecting whether an expectation of privacy in a specific context is a reasonable one given our history and traditions as a people.

So, the Court noted, it is a usual social expectation among a group of tenants that "any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." [3] In the situation where the co-occupant is present and objects to entry, however, the Court determined that a different understanding obtains. The Court observed,

> [I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out". Without some very good reason [such as a health or safety emergency], no sensible person would go inside under those conditions.[4]

> The common law method depends upon our knowledge of the customs and traditions of our people. And a constitution survives over time because the people share a common, historic commitment to certain simple but fundamental principles that preserve their freedom.

[5] See ibid, at 1534.

In other words if someone comes to your door and your roommate tells him to enter but you tell him to go away, the person ordinarily would not feel comfortable entering. Ordinary social expectations provide a guarantee of privacy against intrusions when an occupant with a joint right of control is present and objects.

As the Court explained, moreover, honouring the occupant's objection to police entry protects the Fourth Amendment's central value of privacy in the home while posing no great obstacle to the societal interest in law enforcement. Notwithstanding the invalidity of the wife's consent to authorise a warrantless search, police could use information or evidence she provided them to obtain a warrant authorising a search of the premises.

The Chief Justice wrote the principal dissenting opinion. He contended that social expectations do not support providing a veto to a present, objecting tenant. He added, more generally, that the Court's previous decisions did not support the majority's conclusions in this case. He argued that when an individual shares a home with someone else, that individual assumes the risk that the co-occupant may invite others to enter. If a spouse may consent to a search when her husband does not object, because he is detained outside or sleeping in another room (as occurred in two earlier cases),[5] the same result should follow, according to the dissent, when the husband is standing right next to her. In both cases, in the Chief Justice's view, the salient point was that the objecting resident had already

“The case-by-case methodology of the common law, borrowed by the courts for constitutional interpretation, is a limit on the discretion of the judges.

We do not start from square one each time we consider a question.

Instead, we must consider how the basic principle has been embodied and elaborated in our whole long tradition.”

compromised his privacy by agreeing to share his living space with someone else.

Both the majority and the dissent were required to make certain assumptions about the social norms governing the admission of third persons by co-tenants or co-occupants. And, just as was true in the common law, once an expectation is identified and protected, it becomes more firmly rooted. The Court's pronouncements can become self-fulfilling. If the Court says a police search is reasonable, like searches will tend to take place and society will come to regard them as reasonable. The Court's decisions can have broad implications for shaping societal understandings.

Both the majority opinion and the Chief Justice's dissent illustrate how the common law method of interpretation can support principled constitutional decision-making. By respecting the results and the reasoning of prior cases, the Court avoided an open-ended inquiry into the meaning of "reasonableness" under the Fourth Amendment. Instead, it looked to the principles developed, one case at a time, in previous Fourth Amendment decisions and sought to apply those principles in the new circumstances presented by the case before it. The Court also looked to the common understanding of social expectations, a historic source of law in the common law tradition. The result—notwithstanding the somewhat surprising absence of clear precedent on the point—was a constrained decision-making process, a decision that flowed from the collective wisdom of judges making decisions

> One of the recurring fascinations of the case law method is that lawyers and judges sometimes find that what appears to be a simple, fundamental, straightforward question has not been answered by a decided case—not last year, not last decade, not for the last 200 years.

[6] See 376 US 254 (1964).

over time based on neutral principles and not the personal predilections of individual judges.

If I have not trespassed too long upon your patience, please let me turn to another case where the common law method was used for constitutional interpretation. It has become a foundation of our free speech and free press jurisprudence under the First Amendment to the Constitution of the United States. The case is *New York Times v Sullivan*, decided in 1964.[6]

Let us suppose that we are practicing law together, as partners in a major New York law firm. It is 1964. One of our best clients comes to consult us. He is the publisher of *The New York Times*.

He tells us this. The paper published a full page protest. The protest was signed by eminent Americans, including Eleanor Roosevelt. The newspaper did not compose it, so in some respects it was like a paid advertisement. The statement protested the treatment of civil rights workers and black students at the hands of the police in Montgomery, Alabama. Though there was substantial truth to the basic charges, some of the specific details were false. For instance, the protest stated that Dr Martin Luther King had been arrested seven times when in fact he had been arrested four times. It was not true, as the protest stated, that truckloads of police had ringed the Alabama State College campus in Montgomery.

“The task of the law,
the task of lawyers,
is to tell the story of a people
so they can
strive to fulfil
their aspirations
from one generation
to the next.”

The Chief of Police of Montgomery, Alabama was Chief Sullivan. He was not mentioned in the advertisement by name. Still, he sued on the grounds that the advertisement necessarily referred to him and the falsehoods damaged his reputation. Under Alabama law he recovered the sum of $500,000, which would be a substantial sum now and certainly was a huge verdict in 1964. It might have become even worse from the newspaper's point of view. As you know, each publication can be a separate tort. So Sullivan and others defamed by the ad might have sued in other States as well as Alabama and recovered again.

When our law firm meets with the publisher of *The New York Times*, he tells us that the Supreme Court of the State of Alabama has affirmed the defamation judgment. He asks if we can take the case to the Supreme Court of the United States on the theory that guarantees in the First (and Fourteenth) Amendment require the verdict to be set aside.

When the publisher asks our advice and we turn to the existing law in 1964, we have to tell him there is not much that helps. Most, if not all, States in the United States allow recovery for the common law tort of defamation.

On the other hand, as is true in all constitutional democracies, criticisms of public officials are an important part of our political dynamic. The American press has long played an essential role in our public dialogue and discussion of public affairs. Newspapers might not maintain this role and function if subject to suits of this sort.

> The Court reaches a judgment respecting whether an expectation of privacy in a specific context is a reasonable one given our history and traditions as a people.

> Ordinary social expectations provide a guarantee of privacy against intrusions when an occupant with a joint right of control is present and objects.

In our imaginary law firm meeting suppose there is a brainstorming session, and lawyers begin offering suggestions for what rule might be adopted to relieve the newspaper of its predicament. As an extreme measure, we could say there could be no defamation action at all, or, at least, no defamation action against the institutional press. Or we could argue there can be no damages at all, perhaps devising a proceeding where the injured person can seek to restore his or her reputation but without collecting damages. Or we could urge that damages are limited. There might be no punitive damages.

What about pain and anguish from loss of reputation? Should we eliminate that, too, and allow damages for out of pocket injury only, say lost earnings if the defamed official is fired from his or her job? Or we could borrow from other common law doctrines and say that there must be an intent to injure or knowledge of falsity or some degree of fault. Again, note that this changes the common law definition, because at the outset defamation had not been cast as an intentional tort in the sense of requiring that the speaker knew of the falsity of the statement.

Surely, however, the framers of the American Constitution were familiar with the law of defamation. Can it be supposed that in drafting the First Amendment they overruled or changed defamation law *sub silentio* and that no one discovered this for 175 years?

Let us suppose that the discussion is somewhat inconclusive, but the Supreme Court takes the case and you

“The common law method is a powerful manifestation of the desire of all people to define their own human potential, to understand their own struggle for existence, to recognise the deep yearning to shape their own true destiny, and to go beyond old limits to touch what once was beyond reach.”

are asked to argue it. What is your theory going to be? On your side there is the substantial tradition of a free press. Still, you have little law to help you. Which, if any, of the theories we have discussed do you argue? Or do you argue for all of them? The advocate for *The New York Times* declined to endorse any one remedy over another. Instead, by not committing himself to any one legal remedy, he seemed to encourage the Court to engage in a wide-ranging inquiry in order to determine the appropriate First Amendment remedy.

In the end the Court, as a matter of First Amendment constitutional law, in effect changed the defamation law of the States. For defamation against public officials, the Court imposed a degree of fault as a condition for recovery. The Court held there could be no recovery in these circumstances absent a showing of malice. It defined malice as a term of art to mean knowledge of falsity or reckless disregard for the truth. Based on its newly promulgated standard, the Court reversed the judgment against *The New York Times*. Since 1964, the rule has been extended. For example, it gives a certain degree of protection even in cases where the defendant is not a public official. It is a cornerstone of American First Amendment law.

Note the somewhat ironic consequence of this decision in light of the thesis we are discussing. The Court used a common law approach in interpreting the Constitution; yet in doing so it transformed the common law of defamation. *New York Times v Sullivan* and the cases

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which expand upon it have been deemed an important part of the legal protection the First Amendment affords to the press. Note, too, the consequences of the Court's entry into this field of law in so dramatic a way: The law of unintended consequences follows, and the Court has altered the political and economic dynamic in unforeseen ways. There is a cost to the reputation and dignity of public officials, who must accept indignity and loss of honour to make breathing room for the press. This can cause young, talented people to refrain from rendering public service.

Just as *Georgia v Randolph* does, then, *New York Times v Sullivan* shows how logical reasoning and philosophy can be constrained and informed by case law, traditions, and contemporary understandings. These cases also give some indication of how broad constitutional provisions can be interpreted consistently with the particular characteristics of a given nation.

Some countries may not agree that one resident's objection should outweigh another's consent to police entry into the home. Others may not agree that the interest in free speech should outweigh a public official's interest in protecting his or her reputation from false allegations. Despite these potential differences in discrete applications of fundamental rights, there is broad consensus in constitutional democracies that the judiciary can use the common law method to defend our liberties and certain fundamental rights in a constantly changing society.

“The Court looked to the common understanding of social expectations, a historic source of law in the common law tradition.

The result was a constrained decision-making process, a decision that flowed from the collective wisdom of judges making decisions over time based on neutral principles and not the personal predilections of individual judges.”

The common law and the Rule of Law

The two cases we have discussed and many other cases we could have mentioned re-establish this proposition: One essential framework for the judicial process in your own country, in the United States, and in many other constitutional democracies is the common law tradition and the common law method of reasoning.

This familiar process is becoming instrumental, too, in transnational courts. The essential role courts play in illuminating our constant search for the meaning of justice is more than a source of professional pride. It can be defended on grounds that it is society's way of searching for justice. The ancient common law sought to embody, to give substance and content to, the deepest aspirations of the English people. The task of the law, the task of lawyers, is to tell the story of a people so they can strive to fulfill their aspirations from one generation to the next. Recall what Prince Hamlet said when he told Polonius to accommodate the actors who came to perform at Elsinore. "[L]et them be well used, for they are the abstract and brief chronicles of the time." We can forgive Mr Shakespeare's bias for saying that actors are the key story tellers of our times, but he might have said that in England the truest chronicles of the time were found in the law reports. The whole dynamic of the common law is to tell the story of a people. The case books, as Holmes said, are the story of our moral life.

Now we have a new awareness of the ancient aspirations and yearnings common to peoples around

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>
> The American press has long played an essential role in our public dialogue and discussion of public affairs. Newspapers might not maintain this role and function if subject to suits of this sort.

[7] Sultan Azlan Shah, *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches*, edited by Dato' Seri Visu Sinnadurai, 2004, Professional Law Books and Sweet & Maxwell Asia, page 326.

[8] 543 US 551 (2005).

the world. The common law method is a powerful manifestation of the desire of all people to define their own human potential, to understand their own struggle for existence, to recognise the deep yearning to shape their own true destiny, and to go beyond old limits to touch what once was beyond reach. As the world grows smaller and we ask whether our own generation is making a valuable addition to the legacy of the law, perhaps we can say this: The world is beginning to find that it speaks the same language when it searches for truth.

The precise nature of these principles can vary from country to country, so courts must consider the traditions of their own nations in interpreting their respective constitutions. Still, the experience of other nations may be instructive. As Your Highness wrote in this context,

> The law must develop and grow. We should not be insular but expand our horizon by looking at case law of other common law jurisdictions as well. We should then adopt what is most suitable to us in the Malaysian context.[7]

We concluded the same in a recent case called *Roper v Simmons*,[8] where the United States Supreme Court held that the imposition of the death penalty on a person who committed his crime when he was under 18 years of age violates the Constitution's prohibition on cruel and unusual punishment. For this conclusion the Court relied on the growing consensus in the United States that capital punishment is too severe for juveniles. An even stronger

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is not extant simply because
a dictator makes trains
run on time.

Officials must be taught,
and then ever reminded,
that they perform their office,
not because they chose to do so
but because the law
requires them to do so where
the circumstances warrant.

Government is
the servant of the law
and the people.
It is not the
other way around.

international consensus, while not controlling, supported the Court's judgment by providing some additional confirmation.

Perhaps our time can be known as an era when we came to the realisation that what was the common law in the time of Henry II or Mr Shakespeare, when lawyers and judges tried to give verbal expression to the best of human aspirations, has now become a conversation for the same purpose among many nations and many peoples. A shorthand phrase for the most admirable end of this process is the Rule of Law.

The Rule of Law

What, then, is the Rule of Law?

Although I cannot recall hearing the phrase in common usage when attending college and law school a half century ago, it has deep roots. The potential and significance of the phrase has been appreciated by some scholars for at least a century. Walter Bagehot, AV Dicey, and Friedrich Hayek all wrote about the term. Until the last two decades or so, however, the phrase did not have the prominent place in general discourse that it has today.

True, the term evokes the phrase *Per Legem Terrae*, or Law of the Land, dating at least from Magna Carta. Yet that phrase, too, was not self-defining. It was an appeal to

The law is superior;
the law is just;
the law is
enforceable.

The law is a liberating force.
The law is a promise.
The law is a covenant.
The law tells us—
the law tells the world
—that freedom
is our birthright.
We can use the law
to secure that birthright
for ourselves,
and we must work
to obtain it for
all of humankind.

a general civic understanding that principles of fairness and justice must be respected. (Magna Carta, as we know, went on to spell out some particular guarantees in its other provisions.)

If parsed in its most literal sense, the phrase Rule of Law can be misleading. Suppose an authoritarian or dictatorial regime publishes its decrees and is efficient in enforcing them to preserve security and order. A grammarian adhering to a strict, literal approach might say the regime adheres to the Rule of Law; but all of us know this is a far cry from the meaning or intent of the phrase as we have come to use it. It is a common idiom that the Rule of Law is not extant simply because a dictator makes trains run on time.

The term Rule of Law is often invoked yet seldom defined. There are risks in attempted definitions: the risk of saying too much or too little; of prolixity which defeats the allure of short definition; of a summary so facile that discovery of truer principles is inadvertently foreclosed; of opening the bidding to competing lists of various social goods; of engaging in debate that by itself might diminish the resonance of the phrase. Still, we must not fear analytic inquiry. So it seems appropriate, with these disclaimers, to explore the meaning of the phrase.

As a beginning point for further consideration, let me suggest this: The Rule of Law requires fidelity to the following principles:

> The Court used a common law approach in interpreting the Constitution; yet in doing so it transformed the common law of defamation. *New York Times v Sullivan* and the cases which expand upon it have been deemed an important part of the legal protection the First Amendment affords to the press.

1. The Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all its officials.

2. The Law must respect and preserve the dignity, equality, and human rights of all persons. To these ends the Law must establish and safeguard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them.

3. The Law must devise and maintain systems to advise all persons of their rights, and it must empower them to fulfil just expectations and seek redress of grievances without fear of penalty or retaliation.

You may see a thematic progression here. The law is superior; the law is just; the law is enforceable.

If we can accept this at least as a working model for further discussion, let me offer just a few comments.

The first precept addresses not just governments but all officials, from the most minor functionary to the head of state. Whether or not this is redundant, it seems necessary. Officials must be taught, and then ever reminded, that they perform their office, for instance, issue permits or grant licenses, not because they chose to do so but because the law requires them to do so where the circumstances warrant.

“The phrase
Rule of Law is
vibrant, not wooden,
adaptive, not intractable.
It reminds us that
the law exists in order
to tell the story of peoples,
their defeats, their victories,
their dreams, their hopes.”

Save as an ordinary courtesy and to promote civility, one who obtains a permit need not thank the official. If the permit is justified, the government should grant it even if, as a personal matter, the official might prefer not to do so. Government is the servant of the law and the people. It is not the other way around.

Consider next the second point, addressing the dignity, equality, and human rights of all persons. Though surely the other two provisions do not exceed it in importance, in a sense it is unsatisfactory because one wonders if it is complete. Furthermore, it is stated in such general terms that it all but restates the question of how best to define rights of fundamental importance. Still, it teaches that the rights of persons are central to any definition or understanding of the law's first objective.

The phrase Rule of Law is vibrant, not wooden, adaptive, not intractable. It reminds us that the law exists in order to tell the story of peoples, their defeats, their victories, their dreams, their hopes.

So how well are we doing at telling the story of our own time, the central theme of which should be a universal commitment to the Rule of Law? Do we even have a clear understanding of what we mean by the term? We will find there are some basic misconceptions.

A book I like to recommend to people, particularly young people who want to know about the nature and

> There is broad consensus in constitutional democracies that the judiciary can use the common law method to defend our liberties and certain fundamental rights in a constantly changing society.

background of the law, is a work now over 40 years old, by Aleksander Solzhenitsyn. The book is *One Day in the Life of Ivan Denisovitch*. It is an account of heroic efforts to vindicate the human spirit, describing a single day in the life of a prisoner in a Gulag under the Soviet regime. Solzhenitsyn came to the United States, and because of this book and his other works, became something of a hero of mine.

In June of 1978, he was invited to deliver an address at the Harvard Class Day exercises. I was then living in California but eagerly obtained a copy of his remarks. Like many others, I was disappointed, even shocked, to learn that he used the address to attack the West for its devotion to legal institutions and to the law. He denounced our emphasis on the law and the resources that we devote to its elaboration, saying in effect: "Whenever the tissue of life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyses man's noblest impulses."

I was baffled by the comment. Further reflection suggested an explanation. The American definition of the law and the American conception of a Constitution based on the law are altogether different from the definition and conception that was in Solzhenitsyn's mind. For him law was *dictat*, ukase, a mandate, a command, a threat. It was, in sum, a cold decree. For Americans, the law is a liberating force. The law is a promise. The law is a covenant. The law tells us—the law tells the world—that freedom is our

> One essential framework for the judicial process in your own country, in the United States, and in many other constitutional democracies is the common law tradition and the common law method of reasoning.

[9] An earlier, abbreviated version of these remarks was given at the American Bar Association's annual convention in Honolulu, Hawaii.

birthright. We can use the law to secure that birthright for ourselves, and we must work to obtain it for all of humankind.

Again I ask, how well are we doing in the work of teaching the decency and the primacy of the Rule of Law? It seems to me our momentum has been stalled of late, leaving me with a sense of unease, even foreboding.

Here, in a country that is ever aware of the vast oceans around it, we might use a metaphor: we may be in a period of quiet where the tide has gone out. Are we prepared for a great tide, even a tsunami, of demands and grievances by those who have not understood or benefited from the concept of the Rule of Law?

Make no mistake. Our best security is in the world of ideas; and as to the idea of the Rule of Law there are millions who are suspending judgment before committing themselves to accepting it. Make no mistake. For these millions the verdict is still out. The ongoing common law elaboration and application of the meaning inherent in the definition of the Rule of Law must be our common task. The world is waiting; the world is watching. We must go forward in attaining the Rule of Law with greater determination than ever before. Freedom, yours and mine, is in the balance.[9]