REMARKS AT "LAW SCHOOL FOR JOURNALISTS"

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Thank you, Maida, both for the introduction and for the invitation to participate in this program. After years of judging and public service, I'm well-accustomed to facing a room – be it a courtroom or other enclosure. But facing a Zoom audience of journalists is a *novel* experience. That said, it may be of interest to some of you that speaking into a microphone where I have no physical connectivity with an audience is *not* unfamiliar to me. The first job I ever had was in the news department of a radio station. And I'm happy to say at the outset that the years I spent in that part-time job – writing news copy and reading it on air -- gave me more than just a passing appreciation for the journalistic craft. For those attending this program who work each day to see that news of the peoples' business is accurately conveyed to our fellow citizens, I thank you. Our society – our polity – needs you now more than ever.

Programs like this that bring together judges and journalists are intended to foster a better understanding of some commonalities we share in the work we do, together with the demands that are exerted on us in our respective fields, not to mention the institutional constraints we separately face. As I view our roles, decidedly different though they are,

I think journalists and judges share more in common with one another than they do with either of the other two branches of our federal government. And I hope that as I use this opportunity to speak on the subject of judicial independence, I'll persuade at least some of you that we do indeed have common interests.

Today's program was, I believe, originally scheduled for late March. For those who can remember a pre-COVID-19 world, March witnessed a few events having important implications for judicial independence. Hearken back to Senator Schumer, standing on the Supreme Court steps and—as some viewed his remarks—threatening two Justices by name. Fifteen of his colleagues soon moved to censure him. In their view, the Minority Leader's comments were "an attempt … to undermine the vision of the founders of the United States of the 'complete independence of the courts of justice."

But of course verbal attacks on the judiciary and individual judges have become bi-partisan sport. Barely a week before the Senator Schumer incident, President Trump called on two Justices to "recuse themselves on all Trump, or Trump related matters" after one of them sharply criticized the government's position in a case that was properly before the Court. And in a Tweet storm earlier in February, he used the forum to convey to his 73 million followers his low regard for the judge presiding over the Roger Stone prosecution.

These are just a few recent examples of the hostile climate that our judicial branch faces in the present age.

But let's not forget that other presidents have taken their shots at the judiciary. Remember President Obama during his 2010 State of the Union address calling out the Supreme Court on their *Citizens United* decision – with members of the Court sitting right in front of him. Abraham Lincoln did something similar to that, critiquing the infamous *Dred Scott Case* – although it's pretty easy to give Honest Abe a pass on that one. President Clinton slammed the Court's invalidation of the line-item veto as "a defeat for all Americans." President Truman memorably called Justice Tom Clark "a bad man", as well as "a dumb [SOB]"—although "give 'em hell Harry" didn't use the acronym. (A personal note on this one: as a very young lawyer, I had the opportunity to meet Justice Clark on several occasions; I think Truman was wrong on both counts).

And both Presidents Roosevelt took their shots: FDR retaliated with a plan to "pack" the Court after several decisions striking down New Deal programs; and Teddy called Oliver Wendell Holmes "a menace to the welfare of the nation," claiming that he "could carve out of a banana a judge with more backbone" than Holmes. That, I have to observe, was a dubious claim since Holmes was a twice-wounded in Civil War veteran.

I could go on. But just think: nearly all of this took place pre-Twitter.

At this point you may well be thinking: So what? You've recited the intemperate words and actions of *politicians*. What's unusual about that? And why should life-tenured judges who work for the American people be shielded from criticism—even if it's unfair criticism? Those are fair questions, and they deserve answers.

Judicial independence, as critical as it is to a polity that cherishes the rule of law, is not a constitutional guarantee. You'll not find the term appearing anywhere in the text of the Constitution. And it's not the system the Founders sought to design. They didn't want three branches "wholly unconnected with each other." Instead, Federalist 48 extols a legislature, an executive, and a judiciary "so far connected and blended as to give each a constitutional control over the others." As a matter of design, those words resonate. They are reassuring. Yet the system that exists is really an "orphan of political theory." The Founders did not equally allocate constitutional or political power.

Let me start with what I know first-hand. After the Senate approved my nomination, Congress became obligated to pay my current salary for the rest of my life. Of course, Congress has the power to impeach me – but fortunately, I have no first-hand experience with that

process. Judges are indeed the ones who get to decide what enactments of Congress actually mean. But if Congress doesn't like our interpretation, they can pass a new law. Importantly, Congress determines what cases we hear and decide by establishing the jurisdiction of the federal courts. And they can engage in what is called "jurisdiction-stripping" – taking away our power to hear and decide certain cases. For that matter, they have the power to abolish a court entirely -- though not the *Supreme* Court, of course -- if that's what they want to do. The greater likelihood is, that for political reasons, Congress may decline to appropriate sufficient funds to fully and adequately operate the judiciary. They can cut off funds entirely, for that matter. The recent government shutdown gave us a taste of what that could be like.

It was not for nothing that the Founders established Congress in the very first article of our Constitution.

Then there's the Presidency. Article II. Our Founders' original intent was for the Judiciary to exercise a moderating influence. Most were fearful of what has often been referred to as an "imperial presidency." But the power to moderate has substantial limitations, and an anti-majoritarian Court can be a convenient foil for a popular or populist president. We need only look back to FDR's court-packing plan, which legal historians have argued would have succeeded had it not been for Justice Owen Roberts' changing his mind in a few key

cases—in what was famously dubbed the "switch in time that saved nine." History has sometimes shown that Supreme Court justices are neither unaware nor unconcerned about the force behind shifting political winds. After Justice Chase had been impeached, but ultimately acquitted by the Senate, Chief Justice Marshall – this Nation's architect of judicial review – was sufficiently alarmed by the effort of Thomas Jefferson to oust his colleague that he privately proposed letting Congress overturn Supreme Court decisions it considered "unsound."

I don't want you to think that the Judiciary suffers from an institutional inferiority complex. But the truth of the matter is that the Constitution provides both Congress and the President powerful weapons to train on the federal courts. Despite all that, we have as a Branch managed to maintain our independence. It is an independence from the currents of public opinion. An independence from political pressure or reprisal. An independence in which appellate judges, like me, are free to disagree with colleagues on the merits of a legal issue. The independence to divorce ourselves from our own *personal* views.

Federal judges are independent from just about everything – except, of course, our fealty to the Constitution and the rule of law.

So if judicial independence isn't explicitly spelled out in the Constitution, where does it come from? What gives it vitality? The answer is that it is a value. A norm. It is a guiding principle for both the

creation and exercise of the rule of law. And by "the rule of law", I have in mind the *regality* of law. It is the idea that Thomas Paine stated so simply: "in America the law is king." Every society needs guardrails, so to speak. In this country, we rely on judicial decisions to act as those guardrails, instructing government officials and the public not so much how to act, but how not to act. When someone brushes up against those guardrails – be it a President or a private citizen – it is judges who, as Chief Justice Roberts put it, call the balls and strikes. The rule of law means that we demand from our judges what Hamilton called "an uncommon portion of fortitude to protect minority rights without fear or favor."

But because judicial independence is, as I've said, a value – a norm – it is not immutable. Values and norms shift over time. Just as they have been shaped by a culture, they will follow the directions of that culture. That is simply a function of the human condition and a society's response to its needs and wants. So consider these words of Justice Sandra Day O'Connor: "Judicial independence does not happen all by itself. It is tremendously hard to create, and easier than most people imagine to destroy."

When politicians and pundits pillory judges for personal and political gain … when they distort a court's principled and diligent search for the right answer in a case by characterizing it as an agenda-driven exercise … they tarnish the rule of law and undermine the

public's confidence in it. And remember: judges can't fire back. It would not only be unseemly to do so. It might also run afoul of the ethical precepts that we judges are bound to follow. Oh, I suppose we could all have Twitter accounts. But if we used them to engage in extra-judicial debate over the correctness of our rulings, we would quickly become the "politicians in robes" that too many people already consider us to be.

At this point, let me be clear that I am certainly not suggesting that the news media is in the vanguard of some kind of widespread assault on judicial institutions. And any balanced discussion of how courts have – like almost all institutions – witnessed a decline in public approval requires that we judges assume our share of the blame. We need to make our courts more accessible in many ways. We need to do a better job explaining our reasoning in language the public can understand. We need to do more, ourselves, to promote civics education so that our citizenry has a better understanding of what courts are constitutionally designed to do, and how they carry out those duties. Judges must never forget that they are not activists. Our role demands that we engage in objective inquiries, not outcome-oriented pursuits. I like what Justice Gorsuch said during his confirmation hearings: "A judge who likes every outcome he reaches is very likely a bad judge."

I can tell you from personal experience that reaching a legally correct result can, on occasion, be the cause of genuine judicial discomfort.

Again, judges are not in a position to publicly defend their decisions. Our ability to defend the rule of law itself is limited. Justice Thurgood Marshall once observed that "the only real source of power we as judges can rely on is the respect of the people." I've taught and lectured on the rule of law in many countries where political leaders have sought to accrete power by undermining courts. Places like Russia. China. Ukraine. Turkey. Throughout the Balkans. In America, we have always counted on the people – an *informed* public – to support a system that seeks equal justice under law. I'm not saying we always succeed. But I am saying that we, as a people, have trusted our institutions to consistently support those hallowed aspirations.

Today, our politics are expressed through hyperbolic soundbites and hyper-partisan echo chambers. Reasoned discourse is not the order of the day. When our leaders choose to appeal to social media rather than resort to the courts if they believe an injustice has been done—or simply that legal error has been committed—and when push back from journalists and the public is either muted or non-existent—such attacks on the rule of law are only incentivized. Their frequency and force escalate. Let's call it informational economics. If we want to protect the

rule of law, then attacks upon it must carry a cost – at least the cost of being met with an informed and robust response.

And that's where journalists come in. As Justice Breyer has said, "Judicial independence … is ultimately a question of helping the public to understand." But as I've noted, judicial ethics prevent my colleagues and me from doing what Chief Justice Marshall did in 1819 when he anonymously penned an editorial responding to attacks on his landmark opinion striking down the second national bank. Nor can I do as Justice Holmes did when he invited a reporter into his home and spent an hour dictating a recent opinion into "newspaper language." We need you to do that – to educate and inform the public, to serve as the vital bulwark against attacks on judicial independence.

So please allow me to make a few suggestions. Not advice. Just some thoughts I hope you will ponder.

First, report not just our judgments but the reasons we provide for reaching those judgments. Nothing I am saying is to suggest that you shouldn't thoughtfully critique our work. Judges should be thick-skinned, "able" – as Justice Jackson observed – "to thrive in a hardy climate." And despite our best efforts, we sometimes get these wrongs – even grievously wrong. But in your reporting, please give mention to the process and to the reasoning our courts provide. In this country, our judgments are not announced by naked diktat. They are supported by

legal reasoning, expressed in opinions publicly filed and available on-line, without cost. I've seen first hand in my work with lawyers and judges in many other countries, that is not a global norm.

Second, when you report on a case and discuss a court's reasoning, explain that the result follows from how a judge has applied applicable law. A good judge starts with that law and works forward; a bad judge starts with a desired result and works backward. Too much of the public thinks that what we do is no different from making policy. Over-emphasis on the result reached in a decision, without explaining the legal steps taken in reaching that decision, conveys to the public that we are simply making it up as we go along. And most of the public – unfortunately – already blur the very profound difference between law and policy.

For my colleagues and me, we are duty-bound to follow Supreme Court precedent and to adhere to established Third Circuit jurisprudence. We apply the statutes that Congress has passed, and we interpret them with guidance provided in established rules and canons that suggest to us *how* we should interpret. When my colleagues and I disagree on a legal matter, it is a principled disagreement over what particular sources mean and how they apply to the facts before us. Our positions are dictated by our legal research and how we apply those sources – not by some constituency out there making political demands upon us.

My *third* suggestion is actually, I admit, a pet peeve. Too often, reporting of a court decision identifies a judge by the President who appointed him or her. That actually tells us more about the reporter than it does about the judge. Apparently, the writer of that story believes that who nominated a particular judge has as much influence in the making of a decision as does the guiding legal principles I've been discussing. I'll be blunt: I wouldn't want this job if it meant I was expected to rule in ways congenial to the platform of a political party or the beliefs of a president who appointed me. The intellectual honesty that judicial independence provides is what makes doing this job worthwhile. Why would I want to take on a lifetime job that required me to carry water for either a political party or a former president for the rest of my life.

That said, I'm neither naïve nor Pollyannaish. Of course, presidents usually appoint judges whom they see as sharing with them a set of basic principles. But history is rife with examples of how judges – in particular, Supreme Court justices – have disappointed the presidents who nominated them. We need look no further than last week, as the Supreme Court grappled with Title VII cases, to see an example. Justice Gorsuch and Justice Thomas, each of the "originalist" school of statutory interpretation – each appointed by a Republican president – ended up on different sides of an issue. Theirs was a principled disagreement over an issue – an issue, no less, concerning what was the original public meaning of a law.

Finally, please reach out to us when you feel comfortable doing so—and tell us how we can help you. We judges can't talk about how or why we reached a decision. That is why we publish opinions. And very, very few of us are willing to give interviews. But if judges are going to complain about news coverage or how a story has been written concerning a legal decision, we need to take on some responsibility. This program, thanks to Pennsylvanians for Modern Courts, is one way to encourage dialog. But these conversations need to continue. Many courts and their judges participate in civics programs offered at the local level. Some courts have what we call "courts and community" committees which identify areas of interest and then engage in outreach. Judges need to be available to explain what they do and how they do it. But they also need to be available to journalists for conversations that are either off-the-record, or for background, that offer reporters a chance to ask about process, about jurisdiction, about established procedures. I know it can be done. I have trusted relationships with a number of professional journalists, and I value the conversations we have.

We judges need to raise the curtain a bit. The courts in America are open, and we need to continue to explore ways to make them more accessible and their decision-making more understandable.

I'll close with some observations of the late Chief Justice Warren Burger. They expand on a belief that I expressed when I began these

remarks – the belief that judges and journalists have certain commonalities of interest:

"Journalistic independence and judicial independence have now, for two centuries, served to maintain the unique American system of ordered liberty." "Whether or not judges and journalists always agree with each other on every detail, they share a need for something very fundamental, that neither of them can maintain without the support of the other." "[E]ach supplies a kind of 'lateral support' for the other." And "any force that can destroy the one can probably destroy the other."

Chief Justice Burger was giving us a sober reminder. I'm not a born optimist. But events like today do give me hope. This discussion needs to continue. And I look forward to another chapter – one in which we can have these conversations, face-to-face.