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Good afternoon. It's a pleasure to be in San Francisco representing the American Bar Association. Thank you for having me here today.

I'm sure you'd expect me, of all people, to promote the valuable role that lawyers play in our society. But, actually, it's the baseball fans here in your wonderful city—lawyers and nonlawyers alike—who should understand this better than most. As the ABA's incoming president, Bill Neukom had the honor of speaking at the Commonwealth Club in 2007. Soon after he finished his term as

ABA PRESIDENT a

year ago, he took over as managing partner of the Giants. We were very happy with Bill's leadership of the ABA, and his leadership of the newly contending Giants is certainly promising.

It's great to talk about sports, but I'm really here to discuss justice in these challenging times. As you can tell from my accent, **As the Chinese curse puts it, "May you live in interesting times." This reminds me of the first ABA president from Alabama, Henry Upson Sims. As his luck would have it, he served as our association's leader from 1929 to 1930. He gave a speech at the ABA's**

annual meeting in 1930, as the Great Depression was getting traction. He told the assembled (and I quote) that "Visions of social strife are but phantasmagoria of morbid brains."

Well, if Henry Upson Sims was an optimist, he obviously wasn't a wordsmith. I'm an optimist, too, and I sure hope to spare you from phrases like "phantasmagoria of morbid brains." But if I'm an optimist, it's not because we lawyers turn a blind eye to social strife. It's because we believe that our system of government—our system of laws, our

legal profession, and our justice system—helps us manage and hopefully resolve the societal issues we face.

Our government is dealing with so many major issues that it is mind-boggling: the economic crisis, energy development and conservation, affordable healthcare, the fight against terrorism and its balance with preserving civil liberties. Other civil rights issues involving marriage, families, voting, and so forth. The list, of course, is endless.

We expect our government to confront and resolve these problems. This requires

each branch of government—each separate but coequal branch—to fulfill its unique constitutional role and to act with resolve and common purpose.

What are those roles? We all know the basics: Congress and state legislatures enact laws; the executive branch enforces the law; and the judiciary interprets the law.

Our system of justice was elegantly described by the late Senator Sam Ervin as "the most essential safeguard of a free society." And I can attest from my own travels abroad and the experience of the

ABA's international rule-of-law programs, our judiciary and system of justice are admired and emulated by so many others around the world. This applies not only to our federal courts—which arguably get the lion's share of public attention, especially at the Supreme Court level—but also to our state courts, which actually hear the overwhelming majority of cases in this country.

It's therefore crucial that Americans are aware of and appreciate the role of independent, fair, and impartial courts.

When we talk about judicial independence, we are really referring to two forms of independence.

The first is institutional independence. By this we mean that the judiciary is a third branch of government, independent of the other two. Institutional independence enables the judiciary to check over-concentrations of power in the political braches.

Then there's decisional independence. Guaranteeing judges life tenure during good behavior and an undiminished salary while in office enables them to

make rulings based on the Constitution and our laws, even if those decisions are unpopular or contrary to the political expediencies of the day. Though life tenure is a hallmark of the federal courts, this is generally not the case with state courts, whose judges are selected—or, worse, elected—in a ways that vary widely by state and jurisdiction. Some forms of judicial selection preserve this element of judicial independence better than others.

I'd like to clear up one popular misunderstanding: Judicial independence

does not mean that judges are free do as they please or that the judiciary is not accountable to, and dependent on, the executive and legislative branches.

For one thing, the decisions of all judges are subject to review and reversal by higher courts. And even decisions of the highest court of the land, the Supreme Court, can be remedied by legislation or constitutional amendment. Aside from the appellate and legislative process, judges are also held accountable in another important way, by the codes of judicial

ethics that ensure the legitimacy of their actions.

The Constitution also gives the political branches broad powers over the judiciary, including the power to nominate, confirm, and even impeach and remove federal judges for high crimes and misdemeanors. The legislative branch also has the power to regulate court jurisdiction, and make laws necessary and proper for the exercise of these powers, including setting the salaries of judges and providing funding for court operations.

Our system of checks and balances creates a purposeful tension between judicial independence and accountability that makes some inter-branch friction inevitable. If maintained within manageable limits, this tension is not so much a cause for concern as a sign that the Constitution is functioning as intended. Too much friction, on the other hand, can impede the work of government.

Let's take a look at how the interplay between the branches works, especially the crucial role that an independent

judiciary plays. I'd like to do so by examining some difficult issues raised by antiterrorism policies instituted after the 2001 terrorist attacks. You've probably heard of at least some of these cases over the years, and it can be confusing to keep all the names and issues straight, but it does help to have an overview from today's perspective.

After 9-11, the president declared that terrorism suspects would be considered what the administration termed "enemy combatants." In a series of orders in 2001 and 2002, the administration created

tribunals that did not adhere to the Geneva Conventions or the Code of Military Justice. Arguing that as "non-state actors" the enemy combatants were not entitled to that kind of protection, the administration also declared the system to be beyond review by the federal courts.

The government also established the prison camp at Guantanamo Bay to hold these prisoners away from federal court jurisdiction, arguing that the right of habeas corpus — the fundamental right, centuries old, to ask a judge for release from unjust imprisonment — did not

apply to foreigners being held outside the United States as enemy combatants.

It's important to point out that the courts cannot jump into these issues themselves unless a case or controversy is properly brought before them. The federal courts became involved because lawsuits were filed on behalf of the detainees challenging the terms of their detention.

One of those cases was Rasul v. Bush, which the Supreme Court decided in 2004. The court ruled that the executive branch lacked the authority to deny

Guantanamo detainees access to the U.S. justice system. It determined that the federal courts have jurisdiction under the federal habeas statute to hear suits by Guantanamo detainees challenging the legality of their detention.

Another case that year was Hamdi v. Rumsfeld, which involved the indefinite detention of an American citizen captured as an enemy combatant in Afghanistan. The Supreme Court ruled that U.S. citizens being held indefinitely as enemy combatants must be given a meaningful opportunity to challenge the basis their

detention—in this case, their classification as an enemy combatant—before a neutral, independent decision maker.

Following these rulings, the Department of Defense established tribunals for detainees to contest their status as enemy combatants.

In 2005, Congress passed the Detainee Treatment Act, which restricted captives from initiating habeas corpus petitions and replaced it with a limited judicial review of combatant status determinations. This act also prohibited the use of torture, explicitly stating that

all persons held captive anywhere in the world by the United States are protected against torture.

In June 2006, in a case called Hamdan v. Rumsfeld, the Supreme Court struck down military tribunals, ruling that they had not been established by statute and violated the Uniform Code of Military Justice and the Geneva Conventions. The court reminded the ~~administration~~ executive branch that no matter what independent powers the president may have, he can not disregard existing statutes enacted by Congress.

There was more give and take among the branches of government. In response to the Hamdan ruling, the Bush administration and Congress enacted the Military Commissions Act of 2006. In place of habeas proceedings, detainees could only challenge their imprisonment only through combatant status review trials. It allowed evidence seized in the U.S. or abroad without a search warrant and hearsay evidence to be admitted in trials. And while the bill barred the admission of evidence obtained by cruel and inhuman treatment, it made an

exception for any such evidence obtained before Dec. 30, 2005. Why that particular date? It's the date when Congress banned torture in the Detainee Treatment Act.

And, finally, we had the combined case of Boumediene v. Bush and Al-Odah v. United States, decided at the conclusion of the Supreme Court's term a year ago. The Court held that the constitutionally guaranteed right of habeas corpus review applies to people held in Guantanamo and to people designated as enemy combatants there. This past November, five detainees who filed habeas petitions

were ordered freed by a federal district court in Washington, D.C. Other detainees likewise have since been ordered free.

I speak of these cases to demonstrate the interplay of the three branches of government in determining the balance between our national security and our civil liberties, especially as it relates to the crucial role that courts play.

But focusing on these cases and issues, of course, has its limitations. Federal cases are only a small—a very small—sliver of what America's courts actually

deal with day after day. There's a reason for the expression, "Don't make a federal case about it!" At least 95 percent of all litigation in America's courts is handled not by federal courts—certainly not by the Supreme Court—but by state courts. And just as we know with federal courts, it's crucial to maintain independent state judiciaries as well.

The issue of independent state courts has been made all the more crucial in the recent, interesting times we live in not because of national security issues, but because of money.

For one thing, the recession has affected the operation of courts in disturbing ways. Hardly a week passes without news of jurisdictions severely cutting criminal, civil, or juvenile justice programs due to revenue shortfalls. Here in California, for example, the judicial branch budget was reduced by $256 million in the just-ended fiscal year, and the judicial branch budget is facing a $676 million reduction this year.

If debate over national security and personal liberties is an indication that we're living in interesting times, the

recession is, of course, a major one, too. Reduced funding for the judiciary is especially troubling when the economic crisis is creating more work—not less—for the courts, in cases involving foreclosures, debt management, unemployment claims, and other problems that affect millions of Americans every day. The bar always does a great deal of pro bono work to close the gap in access to justice, but there's only so much we can do. As it is, 73 percent of all lawyers report having volunteered their services to people with

limited incomes in the past year, a volunteer rate far greater than any other profession.

The justice funding crisis was the principal issue for a national summit the ABA recently convened on fair and impartial state courts. Delegations were sent by the chief justices of 37 state and territory supreme courts, including California's, indicating how much the issue is resonating throughout the country. These delegations represented all three branches of state government and justice-system leadership. They developed

strategies to maintain adequate justice-system budgets and ensure the courts' institutional legitimacy by promoting communication, cooperation, and collaboration among the three branches of government. Sadly, as we learned, in too many states separation of powers means an iron wall of separation, creating a mistrust that leads to ignorance of the crucial role of the judicial branch in our system of government.

Aside from financial resource issues, courts face challenges to their independence in other ways.

One involves how too many states select their judges. They do so not according strictly to their qualifications as jurists, but by a political, electoral free-for-all that gorges on money. Though this isn't an immediate problem in California, a courts commission here identified the problem as one California citizens should continually monitor, lest it become one.

In Alabama, as in other states, we elect most of our state court judges in partisan elections. These highly politicized judicial elections undermine public confidence in a fair and impartial judiciary.

As Justice Sandra Day O'Connor has said, and I quote:

"While our judiciary has always faced significant attacks, some appropriate and others not, the single greatest threat to judicial independence is *fairly modern* and *uniquely American*. And that is the flood of money coming into our courtrooms by way of increasingly expensive and volatile judicial elections."

In the election we just had, candidates for the open Alabama Supreme Court seat and outside interest groups spent almost $5 million on the race. It was the

most expensive supreme court election in the country this year. This situation is shameful. National polls show that three in four Americans believe campaign contributions affect judges' decisions.

There's a story you may be familiar with—not from Alabama, but from West Virginia. It's a true story, but it reads like a John Grisham novel. A while back, a little-known candidate for the state supreme court, running against an incumbent justice, ~~received~~ was the beneficiary of a $3 million contribution from the CEO of a coal mining company. The contribution was a

substantial portion of all the campaign money on the candidate's behalf, and he beat the incumbent. Soon thereafter, the new justice provided the deciding vote in overturning a $50 million verdict against the same mining company.

Last fall, the issue reached the U.S. Supreme Court in a case called Caperton v. Massey, where the court was asked to rule on whether the justice should have removed himself from considering the case. Just a few weeks ago, our country scored a victory for an independent judiciary when the Court ruled that the

losing litigant's constitutional rights of due process were violated when the justice who received that extraordinary campaign contribution heard and ruled on the case. As Justice Kennedy's majority opinion reminded us, no one can serve as judge in his own case. This, in effect, is what the winning litigant did by bankrolling the justice's campaign victory.

So, what does the future hold when it comes to the role of a vibrant, independent judiciary? In the federal courts, as we've discussed, our nation's

fight against terrorism continues to raise difficult legal issues that independent courts will decide. We're also sure to see decisions on other policies of the administration and review of legislation involving the economy, labor and employment, civil rights, social issues like same-sex marriage, and just about everything you read in the headlines. Frenchman Alexis de Toqueville famously observed this in his classic 19th century account of our new nation, "Democracy in America." Contrasting us with Europe, he wrote that every societal issue

eventually works its way to and gets resolved peacefully in the courts—independent, fair, and impartial courts, I might add. That's true whether you're talking about heady federal issues like terrorism detention or state secrets litigation, or more novel issues like who—according to the law—gets to keep Barry Bonds' home run ball.

As for our state courts, particularly here, I'd refer you to California's Commission for Impartial Courts, which was formed by Chief Justice George and is chaired by Associate Justice Ming Chin

of the California Supreme Court. The commission is studying and recommending ways to ensure judicial impartiality and accountability for the benefit of all Californians. They're looking at judicial selection and retention, judicial candidate campaign conduct, judicial campaign finance, and public information and education.

What's really promising, I think, is that the commission's membership includes not only appellate justices and trial court judges, but also court executive officers; prominent former members of

the legislature; and leaders of the bar, media, law schools, business community, educational institutions, and civic groups.

Discussions like these frame the issues before us not as problems for the courts, but as problems for and the responsibility of all of us as citizens. The Commonwealth Club does an excellent job of bringing such issues to our attention, and I thank you for allowing me to contribute to these discussions with you.