

C. Ogletree Thank you very much. And let me introduce this distinguished panel that we have today. I'm going to start to your right and my far left seated today, I'm not talking about his politics, but a native of Chicago, a graduate from my neighborhood, University of the Pacific in Stockton, I'm a Merced alumnus, Merced High School. A graduate of my competitor school, University of California, Berkley, I was a Stanford graduate. The former Solicitor General, Partner at Gibson, Dunn and Crutcher and many significant cases as a litigant, as a Solicitor General most significantly is the lawyer who argued Bush vs. Gore successfully in 2000. And many, many other cases of great constitutional significant.

Please welcome the former Solicitor General, Ted Olson. (applause)

In the center of this panel is the Senator from the state of South Carolina, Senator Lindsey Graham. He's a native of South Carolina. Attended USC, not the University of Southern California, we'll get it clear, University of South Carolina, where he got his undergraduate and law degrees. Served many years in the military, elected to the House of Representatives in the state of South Carolina 1994 and elected to the United States Senate in 2002 and serves now. And has played a significant role on many important legislative developments in the last few years. And is also part of the new breed of Members of the Senate looking very closely at issues of judicial independence. Please welcome Senator Lindsey Graham. (applause)

And to his right and my left is the Justice of the United States Supreme Court, the most recent appointee, appointed 11 years ago. Another native of California. A graduate of Lowell High School, a very significant high school in northern California. A graduate of Stanford University and Harvard Law School. Former Chief Judge of the First Circuit Court of Appeals, appointed by President Clinton to the United States Supreme Court in 1994, was the architect to the sentencing guidelines, extraordinary professor at Harvard Law School for many, many years, and someone who's been very much interested in public interest issues. Please give a warm Chicago ABA House of Delegates welcome to Justice Stephen Breyer. (applause)

Let me thank the House for allowing this session to occur here today. I know it's a rare occasion when you have a presentation. This is, I'm told, very common to the House of Lords, and it's very rare that you will have something that has a different sort of taste and different sort of focus. Today we're going to talk about the independence of the judiciary.

And the timing could not be better. We're here in Chicago on August 9th, this is five weeks after the historic announcement on July 1st, 2005, that Justice Sandra Day O'Connor was stepping down from the Supreme Court. As many of you know, Justice O'Connor was the first woman appointed by a president to serve on the Supreme Court and in its multi-hundred year history. Appointed by President Regan in 1981 and served with distinction for many decades. And now the search is on for her replacement. And John Roberts, another Harvard Law School graduate, is the nominee under consideration now.

We won't be talking about John Roberts, at least explicitly, today, but we'll be talking about the independence of the judiciary. And I want to start with Justice Breyer before we get to the substance because we haven't had a chance to have reflections on this. Can you tell us, if you could in a moment, your sense about what it was like serving for the last decade with Justice Sandra Day O'Connor, and what sort of legacy in your view, she will leave having been on Supreme Court for nearly 25 years.

S. Breyer It's been a treat. I loved serving with Sandra O'Connor. I mean, she is an open-minded person. She is an intelligent person. She is a very good judge and she is a treasured colleague. She is a very good friend. Her favorite word is "constructive." And that means that you start to make arguments that are not going anywhere, she will stop listening and, well, years ago when I joined the Court, and she likes to travel, too. Someone told me you could do worse than following Sandra O'Connor. I told her that. And I said, "Sandra, I've followed you to the Navaho Indian reservations, I've followed you in a lot of odd places in Europe and the United States, so don't ever say I don't follow Sandra Day O'Connor." So it's a loss, personal loss. A loss for the Court, a loss for the country. She's been a marvelous colleagues and I have nothing but good things to say about her.

C. Ogletree Thank you very much Justice Breyer. Now, let's talk about the issue of the independence of judiciary. I want to start with Justice Breyer and I'll ask a series of questions to each of our panelists. This is a town hall meeting. After we go through a few issues for about 30 minutes we will open this up to the House for questions from you. Now this is an unusual audience, it's almost entirely lawyers and judges. I know you have a very difficult time in asking questions, as opposed to giving statements. I'm giving you 30 minutes advanced notice to start preparing your question and we're invoking the Ogletree rule, one question, not a three part question, but one question, make it sharp and precise when you have a chance at the microphone.

Justice Breyer, with the announcement of Justice O'Connor's retirement from the Supreme Court, there's been a lot of intense discussion about the future of the Supreme Court. The first replacement of a Justice in over, about 11 years. There's been huge demonstrations and debates and disagreements in the Senate about who is qualified to serve. There are debates about how much information should be provided. Debates about what questions a nominee should answer. And out of all of it, there's been one consistent theme we've heard particularly in the last two years from virtually every member of the Supreme Court. That is from Chief Justice Rehnquist to Justice O'Connor, yourself, Justice Ginsburg and others, there's been this constant refrain that things have never been worse in terms of the relationship between the three branches of government, the executive, legislative and judicial branch. You were appointed to a lifetime appointment. It only happens with judges, and, thank God, law professors. (laugh) And I ask you, what is the real threat to judicial independence that you and your colleagues seem to be complaining about in the 21st century?

S. Breyer

I don't, never, never have been worse I think might be a slight overstatement. I don't think we've gone that far. I used to give a talk when I was in the Administrative Law Section that someone gave me that he discovered some tabloids from the city of Ur in the year 18,000 BC or something, said things have never been worse. (laughter) But there is a natural tension between the branches. The separation of powers, the fact that we do pass on congressional legislation, the fact that we are meant to be insulated from public opinion, and the fact that not all our decisions are right, to tell you the truth, we don't have some great special insight. We do our best. But not surprisingly, a lot of those decisions create a lot of strong feeling in the country.

In fact, I think back at the letters I read that Joseph Story wrote to Chief Justice Marshall at a time when Andrew Jackson had refused to enforce decisions of the court, a decision that tried to give the Cherokee Indians their homeland in Georgia. "Things have never been worse," he said. "The people made the Constitution, they can un-make it." That was the tenor of the remarks. But then it changed and things got back to a little closer to normal. And closer to normal just means serious tension.

You understand why it is, how does it show itself. I think the toughest thing for us, I speak "us" meaning members of the Federal Judiciary, is when it shows itself for lack of support for the institution. And support comes in many ways. It comes in the form of budget, it comes in the form of housing, it comes in the form of pay, and it comes in the form of comments, too. Though, of course, everyone is expected and should

criticize decisions of the court they disagree with. But you put all those together and we get worried. And worry is a state of mind. It's a normal state of mind, even for a judge, though no lawyer believes that. And I think at this particular time, given the budgetary problems, the institutional problems, the pay problem, and a lot of others together lead us to worry. And we don't know exactly what we can do about it. But we'll do our best. It is much your problem, really, what kind of judiciary you want. We're members of the judiciary.

We were talking about – can I make one off-hand remark about the confirmation process. I was frightened you were going to ask me about that and I wasn't going to respond. Or I would have responded with this remark. That it's like asking for the recipe for chicken ala king from the chicken. (laughter) Now you see the point. So I say all these things are your problem, though, of course, I live them out every day.

C. Ogletree Senator Graham, let me ask you from your point of view as a member of the Senate and having to weigh in on these nominations, you must receive letters and calls and emails all the time from constituents talk about activist judges and "Can't you do something?" "Can't you reign them in?" Term limits, other ways to make sure that they're not interpreting the Constitution as opposed to applying it. What's your view from the legislative branch about judicial independence and whether or not it's gone too far or it's going too far.

L. Graham Well, email was a bad thing. (laugh) We've been inundated with people who are very excited about this opening on the Supreme Court and are very vehement in their belief that we need to do things differently. But I guess what concerns me the most, I mean, we've got 6 or 7,000 phone calls and emails about what's going to happen with the Court, is just to make sure that history, as a guide, works pretty well in Washington, if we can get back to the old way of doing business. That's why I was trying to come up with some Senators to find a way out of the filibuster mess.

The independence of the judiciary I don't think is at stake, as long as you have a lifetime appointment. Now I think you can make some arguments at the state level that the appointment process, the election process, may put the judiciary at risk in terms of independence. I think the quality is at stake. I really do believe, you're going to have to ask yourself this question as a want-to-be judge. Am I willing to put my family and myself through this process? And I think more and more people are going to say no unless we in the Senate kind of stand up to the special interest groups. You can have your say, but having your say doesn't mean you can run someone over.

Now I was very proud of the President when he stood up for his friend Alberto Gonzales, even though he wasn't chosen, he stood up for his friend and said, "Wait a minute, knock it off." And I hope people on the left and the right in the Senate, I mean senators will say to the left and right, you have a chance to have your say. But ruining someone's life is not having your say. So I hope that we can conduct ourselves in a way that a 9th grade civic class would be proud of. That we can conduct ourselves in a way that future lawyers who want to aspire to be judges will say, hey, that's okay, I can go through that. Because if we don't, it's not the independence I worry about, it's the quality and the future. And we're politicizing the Court in an unhealthy way. It's not about being liberal or conservative or moderate, it's about getting the best in your nation to serve at the highest levels. So the phone calls are coming, the emails are flowing, I'm answering, but I'm not going to give up my independence in making this decision. (applause)

C. Ogletree Let me ask you a related question in your comments about the independence of the judiciary, Senator Graham. Particularly in terms of what's going on now. Justice Breyer intimated, and so have his colleagues that one of the major barriers to access the judicial appointments is money. That is that many lawyers have chosen not to take the job because of the relatively small pay. Law clerks at some places and young lawyers in some law firms are making more than Justices, with all this commitment. And the question is, can we expect a piece of Graham legislation in 2005 that will address the lack of meaningful raises for the Federal Judiciary?

L. Graham Well, Justice Breyer, don't go buying a new house, even if I introduce it. (laughter) But believe it or not, I have cosponsored legislation that would de-link the pay of the Federal Judiciary to political pay. Because in my world, I mean, to get a 3 or 4% pay raise, you know, you go through holy heck to get it. And I do believe that a pay system for judges needs to be separate than a pay system for politicians. I mean, it's hard to go back in South Carolina and poor-mouth when you make \$160,000. The average person in your state makes less than \$20,000. So it's all relative. And if you do this for the money, you're crazy. There's much better ways to make a living than to do what I do or Justice Breyer. You do it because you want to serve your country.

But there are people out there with a couple of kids who are not independently wealthy, who've been great lawyers, where the money matters. And that's the same for politics. I don't want to have a federal judiciary or United States Senate where you have to be a millionaire to apply. So we're trying to de-link the pay. I think it will bolster the quality

of the judiciary. It's not independence. As long as you have a lifetime appointment you can do what you want. Accountability's built into the Constitution. But if you want to get the best and the brightest, sometimes pay matters and I would like to de-link and depoliticize the aspect of pay because that would be one advancement forward to get the best and brightest to come forward. (applause)

C. Ogletree Before I go to Ted Olson, let me go back to Justice Breyer on that very issue because it's interesting we talk about pay as one of the issues of independence. The Supreme Court, now I think at least 7 of the 9 members of the Court, are all reported millionaires. Maybe 8 of the 9 are reported millionaires. Some of that might have to do with real estate and property tax, etc. And the nominee also is reported to have income well over in excess of \$6 million. Is it becoming more of an exclusive club? And does that have an impact on issues of diversity in terms of the types of people, women, minorities, public interest, the types of people who might consider a judicial career, to what extent does that affect the independence arguments that you've been making?

S. Breyer It is, of course it's a problem. Of course you don't want to have in public life, people who are independently wealthy. I mean, probably the numbers you get are the fact that people have houses, quite a few of them, and they've gone up in value. But that's beside the point. The pay issue is an issue for really two or three reasons.

Can I go back for a second? Because I think you have to start, why do we want judicial independence? Why do you want it? It's worth asking that question because you get a rather complicated answer. Most of us live in a country where over time people realize that by having judges who are independent, they will offer some, not complete, but some added protection for individual liberty, and some assurance in the property area that your investments will be reasonably safe, contracts will be interpreted with independence.

Now those things are tied both to human freedom and to prosperity in a nation. We've learned that over time and a lot of countries having seen World War II realize that the independent judiciary helps a little bit because they saw what happened when you don't have the contrary. And I emphasize a little bit, because the independent judiciary can only help a bit. It doesn't work perfectly. All these things are states of mind, and it helps in that respect.

Now what happens if you don't keep it up? What's the it? It is not total independence. We're dependent upon the legislature for our funding. All

of us in government are dependent upon public opinion in some degree. If the public doesn't understand the rule of law, the rule of law won't take place. All of us are dependent on the other branches as well. So all these things are matters of degree and I say part of it is the life tenure. That helps. Part of it is the pay, though the pay has gone down. It's gone down since I graduated from law school, in real terms, about 38.34%, but who's counting. (laughter) That's only part of it.

And you can't get people to be sympathetic about pay, Charles, how can you? Most people in United States are a lot worse off than certainly the federal judges. And you talk about the problems of judges, my God, everybody has problems. And most problems are a lot worse. So it isn't a personal thing. And judges aren't the best people to talk about it. They're probably about the worst people. And so if you want to maintain it, it has to be others that see a need that doesn't have to do with judges or even lawyers, but see a need there to help the public in general.

Now our concern there with these institutional matters, I think Senator Graham put it very well, I mean, it is a concern about having a judiciary of quality. It is a concern about having respect for the institution, which depends on a lot of things, but primarily on that question of quality. It has to do with having a country that will, unlike what happened with Andrew Jackson, when they see a decision they think is the stupidest decision they ever saw, and probably the worst and the most immoral, they'll still follow it. That's a blessing. And I see that every day in my courtroom, every race, every religion, every point of view, they've all decided, despite our terrible disagreements, they decide these things in courts of law. So I've sat there inheriting an institution that has helped to pull the country together. That's what independence is about. And if I'm not being absolutely specific, it's because it isn't specific. It's a state of mind. I say for the 19th time.

Now all these parts of it, we can't predict exactly what happens if you do that or you do this, but we do know that matters like the wrong kind of criticism, that undermines the institution rather than respects the institution but disagrees strongly with the result, the institution having enough funding, the institution having enough pay, if you like, all those things are part of it, ultimately they depend for their security upon the bar in this room, they depend upon the press, they depend upon the average American understanding the need for him or for her of an independent judiciary.

That's a long speech, but it's tried to give you a feeling for this. And if you say 7 or 8 or 9 members of the Supreme Court feel there's a problem

at the moment, you're right. And I don't know exactly how much – it isn't a matter of detail. It's a matter of mood, a matter of feeling. And maybe what Senator Graham has said is absolutely right. It's this edge on a lot of issues in the country.

C. Ogletree I want to come back to that Justice Breyer, after a question with Ted Olson, the specific ideas to you about what do you need to preserve the independence of the judiciary, I want to come back to that. Mr. Olson, let me ask you a couple of questions, and I want you to sort of answer to that family sitting out there now watching C-SPAN living in Peoria, Illinois, who aren't persuaded there's a problem of judicial independence. That is they see you, you serve for a president at the president's pleasure. You didn't have any job security when you were the Solicitor General. They say the president, no matter how popular or unpopular he may be, he can't serve beyond two terms. They see Senator Graham, he has to go through an election, now every six years. There's no guarantee. And the only part of the judicial.. part of the branch of government that's truly in a sense without any limits on it is the judicial branch, the federal judicial branch. They don't have any limits. Why not retire at 75 years of age? Why not some term limits in terms of the application of those terms? Number one.

And the second question I want to come back about judicial recusal. Another question is that the Court seems insulated from everyone else. We don't know whether, when, why or how they might recuse themselves as we've seen in recent debates from cases where people think they might have some interest.

Let me ask you first about whether or not the public is right to be concerned about judicial independence. The third about recusal as an example, no one is governing the judges.

T. Olson I thought you said no two part questions? (laughter)

C. Ogletree But I'm the professor! (laugh)

T. Olson Judges decide controversies. That is what the Constitution says they must do. When we can't get along, when we have disputes, when we can't resolve them, we put them in the hands of judges. Cases are controversies. Controversies are controversial. And the higher the judge or the more elevated the status of the judge, the more serious the controversy, the more far-reaching it is.

At the Supreme Court level, it is not just deciding the case, it is deciding precedent with respect to issues that range all over the lot from life to birth

to marriage to speech to elections to our governance, everything. And so every decision that a judge makes is potentially controversial. There's a losing side. And at the Supreme Court level it's not just a losing party, it is a losing point of view. So those are difficult decisions.

I've never seen a Supreme Court decision that wasn't a difficult decision in some way or another. It doesn't get there... it doesn't get before a judge unless it's difficult in some respects. The more difficult the higher you get. And we want those judges and those Justices to decide them the best way they possibly can whether we're going to – we know we're not going to agree with all of them. We know half of the population is not going to agree with all of them. But we want those decisions, we want to believe in those decisions, as Justice Breyer has said. We want to come away from that process knowing that we had the best justice that we possibly could. And the best way we have attained that and the reason why our judiciary and our country is the envy of the world is in substantial part because of that independent judiciary. And that, it was decided to give them life tenure. So they do not have to worry about the consequences of their decision except in the form of criticism or there may be certain other exceptions.

But they can, once they take office in the federal judiciary, realize that their only job is to do the very, very best and the most conscientious thing that they can in terms of deciding those controversies. And if they do it that way, and it's true, as Justice Breyer has said, there have been decisions that the Supreme Court has said were wrong decisions. There have been decisions that our public has felt were the wrong decisions. And one of them I participated in, as you mentioned, *Bush vs. Gore*, many people, including I'm sure many people in this room, disagreed with that decision. But at the end of a five-week long contentious process, the Court decided the case, the American public by and large accepted the decision.

And I had the occasion to speak in several countries in Europe shortly after that decision, and many of them may have not agreed with the decision but they were amazed at the American public and the acceptance of the process and the respect that was accorded the decision of the United States Supreme Court. And I think that a large part of that is attributed to the fact that we respect our judges' independence and we maintain it through life tenure.

C. Ogletree Before I get to the recusal question, let me ask you to say a little bit more about the first part and that is, what's wrong with saying a mandatory retirement age of 75? What's wrong with saying a term limit up to 25

years for the Supreme Court or the Federal Courts that – to give some sense of that, that you have along time, that you have a lot of independence, but there is some accountability in terms of people not serving forever. What's wrong with those ideas?

T. Olson Well, I don't think it's necessarily that it's wrong. I suppose a system like that could work if it's a long enough period of time. But the idea that we would lose at age 75, a Justice O'Connor because of some arbitrary standard or a Justice Stevens or Chief Justice Rehnquist. And I could go back through history the Justices, Chief Justice John Marshall served on the Court for 35 years before his retirement and didn't have to leave at 25 years. There's something very precious about the fact that we don't just say at an end of a certain period of time, you're off the Court, good-bye. You're gone. There's something to be said for that continuity on the Court and the commitment that individuals make when they assume a position in our federal judiciary. They can leave, of course. Many of our judges serve as senior judges, or retire and Justices of the Supreme Court retire when they feel it's appropriate. But the idea that they are committed for life, it's not a stepping stone to another job or another position, I think makes, ensures the value that we have to the judiciary and it's so much better than the alternative.

C. Ogletree And Senator Graham, talking to your constituents, is there some merit to those concerned who say there should be a retirement age or a term? Or how would you respond to that?

L. Graham Listen, I hear that more and more. I think in my political lifetime, you'll never hear anyone in the Senate saying 75 is old, by the way. (laughter) The gentleman I replaced was 100. In 2000 the average age of a South Carolina Senator was 91 ½. (laughter) So you're just hitting your stride at 75. (laughter)

But I would imagine if you polled the idea of a continued approval process based on age, that it would probably be very popular. And I think in my political lifetime, which could be 50 years, I hope, there will be an effort by political folks to look at something like you're describing in terms of having a reevaluation of the judges ability to serve, right to serve. There'll be a real assault on the lifetime tenure. And I'm not – I don't want to be part of that because what Ted said makes sense to me. Most people get it. Who would you want to judge your problem? Would you want someone who had nothing to worry about but what's right and fair in your case, or someone who had to look over their shoulder? I think most people get it. And of all three branches, the judiciary is by.. far ahead of the rest of us in terms of public approval. But it's not that much, so that's the bad news.

But the bottom line is that people do respect the judiciary. They want someone judging their case that doesn't have to look over their shoulder.

But the politics of judges is getting to be red hot. Every time a case comes down about the pledge or some other emotional topic, the Congress gets itself up, tries to strip the jurisdiction on the Ten Commandments, and this is going to break one day if we don't watch it. So we need people like Ted Olson, a great conservative who happened to go to Berkeley, it's worth coming to learn that! (laughter) Obviously it didn't stick. (laughter) Which I'm grateful for.

But people outside of our two branches need to stand up and remind the public what's at stake here. The political moment can be red hot. But what's kept this country going is that when it comes to law, winning is not everything. In politics, winning literally is everything now. There's almost nothing out of bounds. In the law it is how you play the game. And I think if you start eroding the lifetime appointment, which there'll be an effort to do, then the independence issue really becomes a monumental problem for this country. We're trying to spread the rule of law in far away places with strange sounding names. And my biggest fear is we'll take it for granted here. So I do not want an erosion of a lifetime appointment. (applause)

C. Ogletree Thank you Senator Graham. Next question is for Justice Breyer. And those who have questions, you should go to the microphones now. I'll be coming to you shortly. Justice Breyer, when Senator Graham hinted that down the road there may be a discussion of term limits, you flinched. It could have been the bright lights in here, but there was a visible reaction. What's your sense about the discussion about term limits? Is that, in your view, a threat to judicial independence in a real way?

S. Breyer It depends on how you do it. I'm beginning to reach the age where most of the things you remember with great clarity never really happened. (laughter) The point is the one Ted Olson made, you want a system that insulates the judge. Now there are various systems that insulate the judge. You could have long terms of years, there are various ones tried in other countries. Our particular one, for the federal judiciary, is written into the Constitution, says life, and you have to serve. And there are disadvantages and there are advantages of that. You want to work out some other system, you have to amend the Constitution probably. I mean, maybe there are ways of doing it, but I think that the doing of it would have implications how you did it, what it would mean.

It's tough, the political issues regarding judges, I think, because most of our work, you know, we're unanimous 40% of the time. Most of our cases

are really statutory. We have administrative cases. And when we consider the Constitution, the Constitution is a document that really doesn't tell people what to do, in my opinion. And in the opinion of most judges, it is a document that sets up a system to tell people that they themselves, in a democratic way, respectful of human rights, and a degree of equality, and a rule of law, and a separation of powers, they themselves, under those constraints, will decide what to do. That is the system. So most of our constitutional cases, indeed all of them in a sense, are about whether this group or that group, this part of government or that part of government, or somebody in the states or someone else has gone too far off the rails. They set the rails. They don't tell you where the rails are going, that's a matter for the democratic process.

Now along the way, because of the words that are written, because of certain cases that come up, it can be enormously controversial, politically. But that has to do with our inability to say what's going to happen in the world or what people will decide, so we're sort of at the outer bounds. And we can't control the politics of it, and I don't think you want us to try to control the politics of it. I think you want us to try to make the decision as best we can in terms of the rails, the outer bounds, that the Constitution lays down. So I have to say the political problems here are unfortunately, or fortunately, really for the Senator to decide, and others. And we do our best, as I say, sometimes we're right, sometimes we're wrong, sometimes we split. And when we split, one virtue is somebody must be right, though I know you'd never know that. (laughter)

C. Ogletree Let me ask you a related question in context that we've talked about before, about the public's perception of judicial independence going too far. And that is particularly in the area of to what extent should our courts consider, employ and embrace foreign governments' legal views? This came up a few years ago when you wrote an opposition to a denial in the cert petition about a death penalty case, about whether or not international law should have been considered.

Justice Thomas actually wrote a response to you, and the court did not grant cert in that case. It became real this year in *Rover vs. Simmons*, the death penalty case for juveniles, where Justice Kennedy wrote the majority opinion finding the death penalty for juveniles unconstitutional, reflecting upon and embracing the experiences of foreign courts and their interpretations of capital punishment for juveniles. He was sharply criticized in many public circles for that opinion as being an activist judge. And I ask you to clarify not just for this audience, but for the larger public the sense that this is not an isolated example, but how the Court makes decisions frequently in reference to international law and that this was not

in some way a legitimate criticism of the Court stepping way outside its bounds, it's something that you do quite regularly.

S. Breyer Well, I think there's the interesting substantively lesser issue, this is just my personal opinion, and there is the more mundane but far more important issue. You're primarily pointing to I think the very exciting, but in a sense less important issue. What's that? I learned about it, shows my political naiveté. I was on one of these panels, my God, I have to be careful what I say on a panel like this one. And there was a Congressman next to me. And he said, "Why are you all following foreign law?" And went on at some length.

I said, well, I thought, "You must mean me." He said, "Yes." I said, "Well, let me explain to you, first we're not bound by any foreign law. We're not bound by what decisions are... But this is a world in which more and more countries have come to have democratic systems of government with documents like our Constitution to protect things like free expression, and there are judges, and the judges have a job somewhat similar to mine. And so why not sometimes on unusual occasions probably, look and see what they said, if it's relevant. Maybe we can learn something. I mean, they're human beings, too. Those judges, I know that's controversial. But (laughter) But why not learn something if we can."

And he said, "Fine, read it, just don't cite it." (laughter) "Pretty good point," I said. So then I decided – I got a little carried away, which was my next mistake. And I said, "Well, to tell you the truth, in some of these countries, they're just trying to create these independent judicial systems to protect human rights and contracts and all these other things. And if we cite them sometimes, not as binding, I promise, not as binding, well, that gives them a little boost sometimes with their legislators, I might say. As I say, the Supreme Court of the United States, which you've heard of as citing us and we cite them sometimes, doesn't bind, but nonetheless it sort of gives them a little leg-up for rule of law and freedom," I say. He says, "Fine," he said, "Write them a letter." (laughter) So at this point I knew I was never going to win a debate like that. And nonetheless, those were the reasons and it does, it has hit a political nerve.

In my personal opinion, the decisions that come up are normally decisions like the death penalty cases, where it's true, I did cite a number of countries on that case, as only illustrative, not as binding. And it's also true that they come up in the sodomy case, it came up there. And I say those are very high visibility cases. And people really disagree with them. Often half the people who disagree and half agree and there's a lot of

controversy. My wife is a psychologist and she knows or has informed me, it's good for a lawyer to have a wife who's a psychologist, (laughter) but she's informed me about a topic called displacement. Displacement is where you're angry at X but you criticize Y. So I just wondered if that isn't what's going on here.

And I'll say one word about what I think is a real but much less glamorous problem. Go look at our docket the year before last. You will see nine cases, take three out, those are [inaudible], Guantanamo, because they're the more visible. You'll see six cases that involve such subjects as the reach of the antitrust laws. Do they apply when a plaintiff in Ecuador sues a defendant in Holland so they can get treble damages here in the United States. What about in Intel, discovery. Company A in Los Angeles wants documents from company B to present to the Cartel authority in Europe, he wants court process to get them. The Cartel authority in Europe says we don't want them. Mrs. Altmann who wanted to get the Klimt paintings that were taken by the Nazis from her uncle, and how does the Foreign Sovereign Immunities Act apply? NAFTA and trucks coming in from Mexico. The Warsaw Convention, and matters of airline liability. Sosa, which involves the question of a tort claims act for human rights past in 1789 raising the question of what's the equivalent of piracy today. Now they don't enter the debate, but they are the debate because all of those, to decide them correctly, require lawyers and judges who have some familiarity or ability to reach out and find out about certain areas of foreign law. That's necessary to decide those cases, and everyone will agree with that, and why I say that's important is because we can't do that in the Supreme Court unless the lawyers know enough about us to point the way. And luckily we're getting briefs on those issues from lawyers who do. Not always from the United States, sometimes from abroad. And the lawyers can't point the way unless the law professors teach the students that this is something they ought to look at. And that's the true nature of the world, commercially, transportation, human rights and a lot of other areas which require us, and we are the lawyers as well as the judges, to get on top of these issues so we can make sound decisions in those areas. That's why I say that that's I think the more important, though I understand the excitement of the first. (applause)

C. Ogletree Mr. Olson.

T. Olson Do you think he's been preparing this answer?

C. Ogletree I think he's been ready. (laughter) Let me ask you from the point of view of being a member of the bar, because you read as everyone else does, the news every day. And there are reports about activist judges, that judges

went way outside the constitutional parameters to reach decisions. Do you see that as a real concern, as a lawyer, not as a Solicitor General, not in any other political forum, as a lawyer, are you concerned by what is a public concern that the reason that we need to check the independence of the judiciary is that judges are way outside their scope of authority in issuing decisions, making law as opposed to determining constitution. Your view as an ABA member and a lawyer.

T. Olson Yes, I will answer that as a lawyer, as a citizen. I don't like that term activist judges, because everybody uses that term for a decision that they don't like. (applause) It will be a subject, it's a label that is not useful. I do think that the issue that comes up is the role of the judge. And the judge's sense of his or her responsibility under a constitutional system to decide cases or to go more broadly than that. And we are going to see that debate in the confirmation process. It will come along in the confirmation process of any judge or Justice that comes along.

And part of that is because the judiciary of this country has become involved in such a far reaching debate from, as I said before, life, birth, death, sex, religion, marriage, civil rights, property rights, elections and there's – the PGA tournament I think you decided a couple of years ago. So that there's nothing that's not on the table. And many of these issues are perceived correctly or incorrectly as political questions. Questions that are properly in the political arena for people to vote on, elect people to decide and to do that sort of thing. And when the Supreme Court makes a decision, if it's a constitutional decision, it is by and large off the table for the political process.

So the people are legitimately concerned when judges exercise judgment with respect to areas that we perceive should be a part of the political debate, and if they become permanent, as they tend to be if they're engraved into the Constitution in a constitutional decision, then people are grieved. They can't participate in that debate any more, except in perhaps the selection or confirmation process of a Justice. And I heard Justice Scalia say this the other day that that tends to make the confirmation process into a mini-constitutional convention every time. And that probably is not what we want it to be.

C. Ogletree Okay, I'll take the first question right here.

Question Thank you. You opened by saying it's the worst of times between the branches. I heard Justice Breyer say, well, maybe not the worst, but then we kind of get back to normal. Senator Graham says, well now it's red hot. Is red hot the new normal or is there a way through this where we

would have something that was more normal as we used to think of that. Or is this just the way it's going to be with everything intensely polarized all the time?

L. Graham Well, it's hard.. I think things are getting back to normal. They were red hot when we were about to change the rules of the Senate regarding the filibuster. That obviously was a moment in our history where things were very red hot. And the reason I don't want to start filibustering judges is because you get into Mideast politics where the next, one party pays back the next. And over time it is about what you did to me last time and I'm going to do it to you this time and good mend and women will not want to serve. So that was about as red hot as I ever want to see it. I really do believe that filibustering judges, the downside is much greater than the upside. And if there's a Democratic liberal president that comes down the road, Ted, we hope not, but that may happen one day, I hope I'll have the courage to look at the qualifications of the nominee and vote up or down. But that was as red hot as I think the country wants it or needs it to be. And the public was rejecting what was going on. We started over and things are better. The jury is still very much out.

And let me tell you about this confirmation process which you can't comment on, but I will. We're being judged as much as Judge Roberts. I think the American public is going to look at the United States Senate and we're very much on trial. So it's my belief that with a chance to start over, which the compromise gave us, that we've done some legislative things that have been good for the country, and we now have a chance not to go to the unhealthy place we found ourselves. And I'll make a prediction, I predict that the confirmation process will be appropriately heated, appropriately confrontational, but in the end, the word appropriate will have survived. And I think the Senate is going to take the opportunity to start over again when it comes to the confirmation process. I think the country will be better off, the judiciary will be stronger, every institution that we rely on to get it right will be stronger. And I sit before you optimistic that we've got a new day coming that will be better than our recent past.

Question Can we say that you're on record that you're against the nuclear option and against the filibuster?

L. Graham No, I was ready to vote for the nuclear option if that's what it took. But I preferred not to have done that. And we found a way – anything called nuclear, that's not just a good thing. But the constitutional option, whatever you want to call it, we found ourselves with no way out. Have you ever gotten that way with your wife or your kids? You know, well,

the senate's not a whole lot different than anything else. You all were voting on whether you should serve for two offices, right? You all run out of things to argue about. So .. (laughter & applause) That happens in the Senate.

Well, let me tell you, having been there just for a couple of years, I can go to any Republican group in the country and talk about judges citing foreign law and taking God out of ... and stick them to the roof. And I'm sure any Democratic senator can go to any Democratic audience and stick them to the roof talking about right wing nutty judges. This is politics at its rawest level. And, you know, I'm just optimistic now that the nuclear tiger has been put back in the cage, that the filibuster tiger that Senator Frisk called, has put back in the cage, and that we won't go down that road because let me tell you, if we ever go down that road, there's no going back. Because I can assure you that the heat on a Republican Senate to filibuster a Democratic nominee in the future will be unbelievably intense. But if we can make it through this nomination and the next, if one comes up, I think we're back to where we used to be for 200 something years and the country will be better off.

C. Ogletree Thank you. Question in the back?

Question Yes, [inaudible] from Pennsylvania. Our Senator, Senator Specter, was reported in the *Tribune* this morning, wrote a letter to judicial nominee Roberts advising him that he intends to ask him about two cases that were decided which overturned certain federal legislation. Senator Specter was criticized for having done that by certain advocacy groups saying that it was an attack on judicial independence. In particular, Senator Graham and anyone else on the panel, do you agree?

L. Graham Well, it's like what Ted said, we want you to answer questions that we'd like to know the answer to, and we don't want you to answer questions that will hurt you if we like you. So that's the standard. (laughter)
However, the past is – you went through this process, Justice Breyer – Justice Ginsburg, about 30-something times said I don't want to go down that road. Now, bottom line for me, I don't think it's fair to get a judge in front of the Judiciary Committee and tell me how you're going to decide a case. Let's let litigants make fact presentations and you decide based on the law in front of you. It's a very dicey area.

If we go down that road – everybody's dying to know what he'll do on *Roe v. Wade* or some fact pattern like *Roe v. Wade*. Public opinion is 62% wanting to know how this judge will decide a line of abortion cases. Well here's what I can tell the public: polling is for politics, not for

confirming judges. (applause) And I hope Senator Specter will not open a can of worms here. I hope – and I'll end with this note, I live in a business where it's rah-rah-rah, 50 plus 1, and nothing's out of bounds. But when the courtroom door opens, and I've been a litigator, defense attorney, prosecutor, you name it, I've done it in South Carolina, is a quiet place. Doesn't matter who you are, how much money you make, whether you're popular or not, it is a place where you can have your day and politics would never give you your day. It's a place where the unpopular can be heard, whether they be shut out in the political process. It's a place where the rich person doesn't have to pay just because they can. It's a place where the weak can take on the strong. And whatever political differences we have need to be parked at that courthouse door. And I hope we can live up to that concept when we confirm this judge. (applause)

C. Ogletree Before we get to our last few questions, you wanted to respond, let me just sort of frame that a little bit. That is does Senator Specter and every other Senator have a right through the advice and consent rule to ask any questions they may want to ask? Does the nominee have a right to refuse to answer? Are both of those right?

T. Olson I think that the Senators have a right constitutionally to ask any darn thing they want. I think that the point that I thought was important to make is that I think any candidate for a judicial position cannot answer those questions. I have argued a number of cases before the Supreme Court and I follow what the Supreme Court does, and of course I have strong views as an advocate, as to the right answer or the wrong answer. But we can never say what we would do as a Justice, no matter how much we know about the case, because we have not read the briefs from the standpoint of the Justice or a judge, we haven't listened to the arguments from that standpoint. It's a whole lot harder when you are in that position to decide what's right or what's wrong and what is a part of the continuity of the decision making of the Court, and your respect for the Constitution and no lawyer or no appellate judge even can say how I would do it if I were in their shoes.

C. Ogletree Let me question you on that just a little bit. One current member of the Supreme Court has commented about another current member of the Supreme Court saying Justice Blank does not believe in stare decisis, period. Now that's pretty significant. Is it appropriate to ask that question?

T. Olson I think that it's appropriate to ask those kinds of questions and to talk about legal doctrine stare decisis and what an individual sitting in that chair is going to do is say yes, I believe in stare decisis but the Supreme

Court reverses itself from time to time and I'm not going to say that I would never do that. I'm never going to say that I don't respect the decisions and the continuity of the Court and I will listen to that debate and I will evaluate that debate in the context. I mean, we want the Supreme Court to be able to reverse itself. I mean, everybody cites *Plessy vs. Ferguson* and there are many other examples, this Supreme Court last term reversed itself. And it has done that from time to time, either explicitly or implicitly. So it all depends, and it all depends on factors that you can not know in advance. And you can not know sitting in this room or in the Senate Judiciary Committee hearing room or writing law review articles if you are a professor. You can not do it until you've been there. And if you are the judge that's confirmed, having said how you would, you've announced that you're not confirmable, you shouldn't be confirmed if you know those things without being there.

C. Ogletree Now when is your confirmation hearing? (laughter) Last two questions. Oh, one's gone. Last question.

Question Mark Schickman from Justice Breyer's home town. You'll see most of us here wearing yellow gavels, which is our way of telling each other that we support the independence of the judiciary. What marching orders would you give to the representatives of the 50 states and the territories and local communities going back to our hometowns in order to support the important issue of the independence of the judiciary?

S. Breyer I think the most important long run thing, which I think probably you do, and do it as much as possible, is to explain to people what the rule of law is, to the press, to high school students, to everybody else, what is – people don't know, you know, they worship the Constitution of the United States, they worship it. But they don't know what it says. And they're not certain what the role of the judges is. And they're not certain about the participation being necessary for democracy. They don't know what all that means. And I think lawyers and judges, too, when they have the chance, Senators too, I'm sure they do, you get out to speak more, you love to speak to the high school students. I do, too.

Now I know you were giving me an opportunity to tell you 1, 2, 3, go get us more pay. I won't object to that. (laughter) Go get us more resources. Do your best to see that the criticism doesn't fall into the institutional criticism as opposed to the decision base. I think that all that's fine. I think all that's fine. But if you meet a Senator, as I do from time to time, or a member of Congress, or a member of the executive branch, or anyone in public life, including judges, and you say, "What is the most important thing?" It is this transmission of this thing we've inherited, this

marvelous, marvelous thing we've inherited. That people will follow the law, even law they don't like. That there are courtrooms open, where just eloquently, you said, Senator. What it is, a courtroom, where a public official rather high ranking talks directly to every single person who has that legal case in front of them and devotes the time and attention. That isn't a bureaucracy, that's a court. Fabulous human rights part, the democracy part, everything I've said. I'm sorry, I guess after a time you begin to sound like all you're saying is apple pie and so forth. But it's true. And that the lawyers can go out and explain to people the need for an independent judiciary and can explain in the process a lot of other things in the Constitution, will do so much good.

I mean it. I said once, you know what you need to be an independent judiciary. I said this to some Latin American judges, "You need those two terrible organizations, the press and the bar." I was being funny, you see, that's dangerous. (laughter) But he came up and he said, "Justice Breyer is right. Terrible, the bar! Terrible!" (laughter) That isn't what I thought! I thought the opposite. So, that's a long answer but I mean it very much. (applause)

C. Ogletree Any quick, concluding comments. I want to ask Justice Breyer before we end. Any closing comments Senator Graham?

L. Graham Thanks for having me. I'm optimistic. I wasn't so optimistic a couple months ago that we're going to get back on track. They we're going to have a healthy tension between the judiciary and the legislative branch of government. Accountability and independence are very hard to manage. And you've got to choose. And here's what I think is the right way to go. When it comes to having my day in court, I think I'm just like every other American, all I can hope for is to be treated fairly. I don't want any poll to be brought in, I don't want anyone's political agenda to be front and center. I just want what I did and who I am to be front and center and have a chance to challenge the people who said I did something wrong, if necessary. Most Americans get it, Justice Breyer, they do. They don't know all the details, but they want a judge that doesn't look over their shoulder, that looks forward, looks them in the eye, gives them a fair hearing, and a fair day in court.

Voting is not a democracy. Saddam Hussein got 100% of the vote. A democracy is the rule of law supported by public participation. The key to a democracy is, is if you lose the election, you don't lose your house, you don't lose your business, and you don't lose your rights, because the law won't let that happen. Thank you for having me. (applause)

C. Ogletree Mr. Olson?

T. Olson I don't think I can follow those very well, but I will make the mundane point, the business about judicial compensation. It's something that everybody in this room can do something about. Republicans or Democrats. What are we telling our judges when we pay them at a level comparable to what first year lawyers can make? What are we telling the public about our respect for the judiciary? And it's gone on far too long. There are problems, and we don't have time to talk about them, in the Congress with respect to this, but certain individuals feel certain way. The only thing they respond to is political pressure. And the only thing that we can do, Republicans, Democrats, conservatives, liberals, everybody in between, because I believe that everybody in this room feels strongly about the independence of the judiciary and respect for our judges, is to get behind that and to be heard and to put pressure on their elected representatives.

It's not an easy thing to do, because the people that benefit, if this is done right, our judges, it's not giving aid to a farm program or a fuel subsidy or something like that. So politically, it's not an easy thing to do, but the power that's involved in this room, the political power, the ability to speak, the knowledge of how to pull a political lever is here in this room. And the people that care about it are here in this room. And you can do something. And we have to.

C. Ogletree Thank you very much. And Justice Breyer, the final question. (applause) More than 40 years ago Nelson Mandela found himself before a tribunal in South Africa where he was subject to being executed for opposing apartheid in South Africa. And he said he believed so much in democracy and the absence of white or black domination that he'd rather die than to see a non democratic society in South Africa. That changed when he was elected president in 1994 and served that country ably.

You had the chance to witness a reflection of judicial independence in South Africa when you went to visit that new courthouse when it opened last fall, as a representative of the US Supreme Court. Can you share with us, in closing, both that court, the symbolic value of the South African Supreme Court, as well as Nelson Mandela's own view as an executive member of government when he was not opposing apartheid but he was the president. And finding the courts playing an important role in making difficult decisions about South Africa's future.

S. Breyer Yes, I was in South Africa for the anniversary, 10th anniversary of that court. And there were judges from across the world who went there. It is a

remarkable thing to see. It was a new court building, which they were celebrating as well. And you walk up a kind of path, it's stairways, it's out of doors. The court is over on your left, the building, and on your right is a wall. And it is the wall of the worst prison that had existed under apartheid, where a lot of the anti-apartheid leaders had served, they'd been in jail and treated very badly, too. And the wall of this former prison has become a wall of the court. That's a wonderful thing to see.

And the discussion was wonderful, too. And it was so interesting. At dinner, Nelson Mandela came in, and it's marvelous to see him. And he got up and he has a marvelous manner. He talks very directly to people. And he said that one of the things that he'd wondered about was what was he going to do when the Supreme Court there, the constitutional court in South Africa, decided against him. And he said, "Well, they did decide against me in a case. And I thought they were really wrong. But I got the government together and I said, 'We're going to follow it.'" And he told the people on the court that they'd follow it and he told the press they would follow it. And that simple statement did more for the rule of law in South Africa than I think 19 law review articles, at least, and it was a wonderful thing to see.

It was wonderful to see how that court was working, to see him, and to see really the rule of law in South Africa. And of course, that was a form of communication. I mean, you say, what is the answer to this? I'm so naïve but I think it's true, I believe in communication. I believe this panel has been good. I believe discussing these topics is good. I believe that one of the problems that works against us is time, we're all very busy. And yet, if you can sit down, talk about these things with congressmen and representatives and judges and lawyers, I'm naïve enough to think it does make a difference. And it does make a difference. And I thank the ABA very, very much for the opportunity for all of us to be here today.
(applause)