

**Remarks by Justice Anthony M. Kennedy to the Opening Session of  
the 2012 Ninth Circuit Judicial Conference, August 13, 2012  
Maui, Hawaii**

Thank you very much Judge Taylor, Chief Judge Kozinski and my fellow citizens devoted to ensuring that the idea and the reality of the rule of law come ever closer to our nation and its people. Thank you very much for the many informal greetings and for the formal welcome you have given to us here as we come back to the circuit conference.

The circuit conference is a prudent and a proper exercise of the judicial function. We, in the judiciary, are proud that we are men and women of serious purpose. And we're immensely proud of the fact that we're part of a profession, including members of the bench, and the legal academy that shares that purpose. Judges are absolutely committed to the idea of excellence and the performance of their duties and of seriousness in the discharge of their oath to protect all persons under the laws of the Constitution of the United States. We have with us members of the legal academy, men and women of great intellectual intensity. We have with us members of the bar who are committed to the performance of their duties with honesty and diligence. If the American public knows, and they should know, of what we do at this conference, they would be and should be immensely proud, not only the judiciary and the members of the academy and of the bar who are here, but of the idea of law in itself.

We know that it's a characteristic of the American people in every profession, in every calling that they pride themselves on continuing education. That's what give us our competitive edge in

a competitive world. Just look at the lists of meetings and agendas of any hotels that you enter as you go throughout the United States and see the kinds of meetings, covering every aspect of American economic and social life. For judges, however, this is also part of our oath. We know, as the members of the academy and members of the practicing bar, that when we enter at each stage of our profession, that's not when learning ends, that's when learning begins. And we are required to learn how better to improve the administration of justice so that the rule of law can become a reality and not something that simply a remote idea.

In Central, Eastern Europe, the United States has spent, through the members of the bench and bar, and the academy, enormous efforts in establishing the rule of law. But what we see is that the bench, the bar, and the academy are isolated units. They do not talk with each other. It's simply not their tradition to draw their judiciary from the ranks of the practicing bar or from the academy. And the result is, it's very, very difficult to improve the administration of justice in those immensely important countries in Eastern Europe, where the rule of law still seeks to flourish. Not long ago, I was in Hungary and was told there were some serious problems with what we call criminal rules and civil rules. Well I said what you need is you need a committee consisting of members of the legal academy, the bench, the bar, and they will recommend rule changes. They were astounded that the people could talk together, and this is dangerous. In an Eastern European country, we are having, laws are having terrible problems now because a chief justice assigns the judges under his jurisdiction to remote reasons reduced salaries if they rule the wrong way. And at a meeting, a very young judge, judges are young in Europe mainly because you go on a judge track right out of law school. A wonderful young woman stood up and she said, "There are two tragedies in my country. One is that the rule of law is slipping away. The

other is almost everyone seems to know it and no one seems to care.” We do care about the rule of law in this country and that’s why you are here.

Judges and the members of the profession who are with us at this conference are committed to the idea of absolute probity, absolute probity in the way we behave, absolute probity in the way we discharge our duties, and absolute probity as we seek to come closer to the real idea of freedom, and that is the purpose of this conference, and that is the history of this conference over many years, and I’m immensely proud to be with you.

Perhaps, early in the commencement of my remarks, I should say what really should be the closing and that’s just to add a few words about Judge Jim Browning with his obvious length of service for over 50 years. He was on the Court of Appeals of the Ninth Circuit to welcome me when I came and to bid me farewell when I left. And each of those events was warm and friendly on both sides. These wonderful pictures of Jim Browning was just a little provocative for me in the sense that if he were here, I knew that there would be that serious look but in 30 seconds this wonderful smile, and that smile was real. It showed the inner man. I occasionally would storm in to his office about some administrative matter using maybe a case and he’d smile and say, “Well, we can talk about that” and that was kind of the end of it. He was a marvelous administrator in that respect and a great figure in the history of this circuit and the American judiciary. Thank you, Cathy, for really that very, very beautiful tribute. He, of course, would have endorsed what Chief Judge Kozinski had said about this conference, and he would have been thrilled that it’s in Hawaii, and it’s important that this conference meet frequently in Hawaii. There is a loveliness, even a loneliness in the Pacific. that makes it fitting for us to

search in quiet for the elegance and the beauty of the law. The Hawaiian islands, a state on equal footing and of equal dignity with the 13 original states, and all of the other states, is a bastion of freedom in the Pacific. And together with our friends from Federated States of Micronesia, from Marshall Islands, from Palau, from the Commonwealth of the Northern Mariana Islands, and from Guam, they, in a war, they've 'till within the living memory of many of us. suffered anguish and disaster, and hurt and death in defending freedom. And it's an honor to be here in Hawaii to celebrate the fact that it is citadel of liberty, a bastion of freedom, and we thank the Hawaiian people for their gracious welcome that they always give to us when we come here.

Now the chief judge mentioned the fact that part of the value of this conference is that it's really an opportunity to have personal conversations in which different members of the professions can say in a friendly, professional and candid way how we can improve the administration of justice, and the interaction between the various branches of our professions. My first circuit conference was in 1975, and that was an era in which, judges, some of them, still felt that they had the privilege of berating members of the bar, and Cliff Wallace and I were in the back of the room and we saw two United States district judges stand up on one of this chair like this in a meeting with their coat off and their tie loose and pointing a finger and shouting at attorneys. And we resolved that this is not decorous judicial behavior and it was not consistent with the dignity that should be accorded those who engage in the very difficult practice of law. That was a negative lesson, but there was also a positive lesson. Those were the times in which courts were just beginning to realize that it was necessary for the judicial system, for judges, trial judges to take an active role in the management and shaping of the case from discovery through its resolution at full trial. And attorneys, and I was one of the attorneys when I was in practice and said well

“Who is the judge to tell me how to control my case?” Well of course there’s a false premise here. It’s not the attorney’s case. It’s not the client’s case. It’s the court’s case. It’s the law’s case. It’s the public’s case. And that conference in 1975, I quickly saw that this was a false premise, and it was very interesting that the leaders of the bar who were present at that conference saw the same necessity for judicial intervention, and they became ambassadors to the bar as a whole to point out that what the judges were talking about in taking steps to make the judicial system more efficient was an absolute necessity, and the circuit conference served a wonderful purpose in that respect. And over the years, the circuit conferences of this circuit have had marvelous programs.

You may remember, those many of you who were in Sun Valley, where there was a program where the format where every one has a clicker and then you have four different choices of answers. You can answer A, B, C or D, and you would click so 20 percent clicked on A, 30 percent on B, and so forth. It was remarkable to me that by the time I understood and absorbed what the question was that the clicking had already happened. We were on the next question. And the further you are removed from the trial process, the more of a public danger you are. So this conference is immensely valuable for those of us who are no longer actively engaged in practice, and I very much appreciate and value the opportunity of being here.

With that preface, I probably should not suggest to you those subjects that you might consider for future conferences, but I think your conference, Chief Judge Kozinski, and Judge Taylor ought to give some attention on how you’re going to spend the 24 months between now and the next circuit conference. I can understand that a reasonable argument would be made from a cost-

benefit standpoint that from time to time the conference can be held every two years but the interim should be used to prepare diligently for the next conference and with distance learning, with Internet websites, with the close cooperation we have between bench, academy, and bar. It seems to me you can use this period of time in a very, very productive way, and I suggest, with all respect Chief Judge Kozinski, you have a committee that looks at the Browning tradition of having a committee, that looks at ways in which you can keep a very close and active consultation with the members of this conference during the 24 months you have until the next one. Let me suggest just a few topics again, with the disclaimer that my present experience is somehow limited, and I may not understand some of the real problems that you're facing. It does seem to me that on this same subject of management and litigation that the academy and the bar can be of immense help to the justices, to the judges in trying to expedite the disposition of complex cases. We, on the Supreme Court of the United States, are frankly puzzled as to why our *certiorari* workload, our *certiorari* grants are at about one, almost one-third of what they were when I got to the (unintelligible). In the court of appeals, since, when I came to the court of appeals I succeeded Judge Charles Merrill of Nevada. I said, "Well it's good that you're a senior judge. You deserve to have a reduced workload." He said, "Wait a minute, my workload as a senior judge is three times as it was when I was an active judge." He told me that in 1975, and I could make the same statement to you today that the workload of a United States circuit judge on the Ninth Circuit has more than tripled since I've been in it. So you have case management problems. Now, I can see the necessity for case management systems that may not at first appear attractive, but I think you have to begin considering it.

The Federal Judicial Center has a pilot program for the assignment of judges in patent cases. It

would be voluntary on the part of the districts involved. The individual calendar system was promoted by former justice of the Supreme Court [Tom] Charles Clark to the members of the judiciary as a way to ensure that cases were not assigned in a way that might influence their outcome, and the judges would have the satisfaction, the intellectual and professional satisfaction of seeing a case from beginning to end, and that's still an important part of your system. It does seem with some cases, like patent cases, there may be judges who would be willing to use their expertise in taking more than their share of the patent cases, and these are the kind of discussions and proposals you must consider with great seriousness. Patent cases mean while litigation is going on, technical change has to stop, and in an age, for instance in the drug area, where patents must be ratified within a very short period of time because of competition, delay in litigation is simply unacceptable. Now many of the cases that once were on federal docket, as you know better than I, go to arbitration. In a way, there's nothing wrong with that. We're an efficient society, and if there's a more efficient way to resolve a case than going to litigation then I can understand why it should be chosen.

On the other hand, it's somewhat frustrating for those of us who have devoted our careers to the federal judiciary to find that federal courts are not recognized as the fairest, most efficient, one of the most fairest, most efficient, one of the most just fora for the resolution of disputes that we can possibly devise. And so we must talk with members of the academy and members of the bar about ways to improve the management, complex actions. As you know in discovery that's been going on for years, but we now have very sensitive tools where judges meet informally with the lawyers at the very outset of the trials, and say I will give you a tentative, tentative ruling to show you my thinking and begin to shape the course of the litigation in that way.

There is a comment, and I'm not sure that it's true that public schools can be in trouble in certain areas because of those who can afford it take their kids out of the public schools, therefore, there's no base of support for the public schools among all, among some of the most powerful members of the community. That same metaphor might apply to the courts. Does the existence of arbitration, which is a most important of alternate device for the resolution of dispute, does that mean that supports for the court are eroding? I think your conference, Chief Judge Kozinski, should study this matter.

Secondly, we have wonderful law professors here, the senior law professors like former dean Sullivan, Kathleen Sullivan, Professor Arthur Miller, some wonderful young law professors here. The deans of the law schools met this morning. I would just say about Kathleen Sullivan, I shared a podium with her twice, and she's a marvelous speaker. We got one very hard question from the audience. She quickly said, "Oh well, Justice Kennedy can answer that." And I like to tell people, "You know, well I've taught with Arthur Miller." Well that's true in the sense that we've been on the podium together and did a tape on three different occasions, but you don't teach with Arthur Miller, you learn from him, and he's a great professor. So those professors of that stature are interested in the work of the court of appeals. Some are brilliant young professors who are here and are on your program. I can say the same about the deans who are here. We are now in at a time when law schools are questioning whether or not they are teaching students the right way, and it seems to me that the bench and the bar can engage in serious discussions with the law schools to advise them whether or not, say for the next 20 years, that they have the proper approach for teaching those who will soon be the trustees of the law as active practitioners. That is urgent. You have to remember, we think of graduate law schools as the norm. It's not. There



are no graduate law schools as we know them in Europe at all, in most of Asia. Law schools on the American model exist in South Africa, the United States, Canada, Japan; that's about it.

Those countries could not, other than Japan that did it in our own lifetime, suddenly say we're gonna have a three-year law program, and after graduate school they can't afford to do it, and so we have to begin examining our own law schools, and I think this conference could be of considerable assistance.

Now with the background of Hawaii music which is a very gentle cue for me to conclude my remarks, I might say there is one other subject, a matter of considerable delicacy yet one which must be discussed. And that is the appointment, selection, and confirmation progress, process for new federal judges. The Constitution requires Senate confirmation. The Senate is a political entity and will act in a political way and that's quite proper. When you're appointed to a lifetime position, it's proper for the political branch of the government to have considerable authority over that decision. On the other hand, there is a difference in a political function and a partisan function, and the current climate is one in which highly qualified eminent practitioners of the law simply do not want to subject themselves to this process. And I think it's incumbent upon members of this conference, particularly the members of the bar to face the fact that they have the responsibility to ensure that this appointment, selection, and confirmation progress is done without the partisan intensity that now accompanies it. This is bad for the legal system. It makes the judiciary look politicized when it is not, and it has to stop.

In closing, I had the pleasure of coming to Los Angeles Loyola School of Law to help dedicate a wonderful center for Judge Art Alárcon. I told some of you on the way out I read the book "The

Lincoln Lawyer” by Michael Connelly. I didn’t see the movie but it’s a good read for escape. He has in the last paragraph of the book, his herald, the lawyer goes through terrible trials and himself is injured but finally after three or four months he can get back to practice, and the author says, and so he went back to practice. He returned to a world without truth. I do not see the legal profession that way. It is true that as a matter of operational necessity, we sometimes must settle cases and be concerned with caseloads, backlogs and procedures, but the law ultimately is a search for truth. There is truth in the law. The law has a moral basis. These principles are discernable. It may be that the truth is difficult to find. It may be that we can come close to seeing them without ever really doing it, but we’re not just like Sisyphus on an endless staircase or endless hill. We do come to conclusions that are right and that are true and that are proper. That’s our duty, our duty as professors, as lawyers, and as judges because in the process of trying to find the truth and sometimes doing it, we celebrate freedom, we celebrate the idea of liberty—that is the purpose for our nation and the meaning of our Constitution. Congratulations on being here, and thank you very much.

End of remarks.