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Thirty-First Annual Pepperdine University School of Law Dinner: Keynote Address

The Honorable John G. Roberts, Jr.*

Thank you very much President Benton for that generous introduction. Such a nice introduction—I wish my parents were here to hear it. My father would have loved it and my mother would have believed it. And thank you very much for the Robert Jackson Award. I appreciate that it is aspirational and not earned. I am reminded what General Peter Pace, one of our great military leaders and until recently Chairman of the Joint Chiefs of Staff, once said. He said as a young officer he resolved never to accept an award that he had not earned. As his career progressed he said he changed that. He said that he would never accept an award that someone had not earned. And it is in that spirit that I am happy to accept the Award—on behalf of the men and women in the Federal Judiciary who labor every day to protect the Constitution and preserve the Rule of Law.

What a delight it is to be here in Pepperdine. During my short stay here I quickly learned why Pepperdine is renowned for combining academic excellence and faith-based values at what surely is one of the most beautiful spots in our country. I grew concerned last fall though with whether there would be a Pepperdine for me to visit, and I'm glad to see that the community has overcome the natural calamities that visited this area in the recent months. But I am not surprised by the resilience of the institution. When George Pepperdine established this university, he pointedly said that he intended to create a school that would in his words, "Help students build a foundation of Christian character and faith which will survive the storms of life."

I think the resilience of Pepperdine students was in evidence this afternoon through the performance of those who endured the Dalsimer Moot Court Finals. And it was a special pleasure for me to participate in the moot court with my distinguished judicial colleagues Chief Judge Edith Jones¹

* Chief Justice of the United States.

1. Chief Judge, United States Court of Appeals for the Fifth Circuit.

and Judge Ricardo Hinojosa² who I see on a regular basis in Washington because of their leadership positions in the Judiciary on the Judicial Conference.

Now I would like to point out to our moot court participants that they presented their arguments on a very historic anniversary. Two hundred eighteen years ago yesterday, the Supreme Court unsuccessfully attempted to open its first session at the Merchants Exchange Building in New York City. Only Chief Justice John Jay and Associate Justices William Cushing and James Wilson were present, and that was the problem. The Judiciary Act of 1789 had designated a six member Supreme Court and required a quorum of four to conduct business. The Chief and the two Associate Justices could not conduct any judicial business because of a lack of a quorum.

But fortunately on this day 218 years ago, Associate Justice John Blair Jr. arrived in New York, and the four members of the Court were able to open the Court session and commence the Supreme Court's first day of proceedings. In the days that followed, the Court issued a rule creating an Office of the Clerk, and the Court also admitted the first member of the Supreme Court Bar, Elias Boudeno. That's a tradition, by the way, that has continued to this day, and I was very pleased last fall to admit in open Court a group of attorneys from Pepperdine on the motion of their Dean.

Once John Jay's Court established the Office of Clerk and admitted members of the Bar, it adjourned because there were no cases for the Court to decide. Now thankfully at Pepperdine today we had a quorum, we had able counsel, and we had an interesting case to consider. And I would like to congratulate all those who participated in the Moot Court Program for a cause well argued and a competition well staged.

The Robert H. Jackson Award, which you have honored me with tonight, is especially meaningful to me because in the October 1980 term I was a law clerk to then Associate Justice William Rehnquist, and he in turn in the October 1951 term was a law clerk to Justice Jackson. During that year, Justice Jackson wrote one of the most famous concurring opinions in the history of the Court, his concurrence for himself alone in *Youngstown Sheet & Tube Co. v. Sawyer*,³ otherwise known as the *Steel Seizure Case*.

Now among lawyers, and I hear that there are a few of them in the room, Justice Jackson's opinion is well known for its pragmatic analysis of the limits on Executive Power. Chief Justice Rehnquist would later with characteristic modesty say that he was merely a spectator and played no role in the crafting of the opinion. But he surely had a front row seat to one of

2. District Judge, United States District Court for the Southern District of Texas. Judge Hinojosa also serves as Chairman of the United States Sentencing Commission.

3. 343 U.S. 579 (1952).

the greatest debates of the era. And from that vantage point, a young William Rehnquist observed the qualities of a truly extraordinary individual.

Like George Pepperdine, Robert Jackson was born into a family of modest means. Jackson grew up in the small town of Frewsburg, New York. And that brings us to another reason that this Award is especially significant for me. I was born in western New York not far from Frewsburg, not far from Jamestown where Justice Jackson later practiced law, although my family left when I was young for the warmer climates of northern Indiana.

It's interesting that we're gathered here on the West Coast to cite some remarkable evidence of how quickly our country has grown—the fact that Jackson, born in 1892 in western New York, self-consciously considered himself something of a Westerner. He had often pointed out that he was separated from the Eastern establishment by the Appalachian Mountains and felt a greater kinship looking West than he did East.

Justice Jackson had little formal education beyond high school. He was the last Supreme Court Justice to become a lawyer without completing law school—I don't want the 2Ls and the 3Ls to get any ideas out there. I don't think it would work today.

But although he lacked a law degree, he possessed simple virtues of character, energy, and brilliance. Despite his lack of formal legal education, or maybe because of it, he became one of the greatest masters of the English language ever to sit on the Supreme Court.

Chief Justice Rehnquist identified four attributes that helped to explain the strength of Jackson's character. As Chief Justice Rehnquist put it, "Jackson possessed . . . [that] rare ability to profit from experience, to accommodate his views when that experience seemed to require accommodation, and yet to maintain throughout his life a sturdy independence of view which took nothing on someone else's say-so."⁴

Chief Justice Rehnquist pointed out that, consequently, as Jackson steadily progressed from successful small town lawyer to General Counsel of the IRS to Solicitor General, Attorney General, and ultimately Associate Justice, he was able to carry along what Rehnquist called "a measure of Frewsburg common sense and a recollection that there was indeed life west of the Appalachians."⁵

But what seemed to impress Chief Justice Rehnquist the most was that Jackson did not regard his private practice in New York as a route to higher

4. William H. Rehnquist, *Robert H. Jackson: A Perspective Twenty-Five Years Later*, 44 ALB. L. REV. 533, 536 (1980).

5. *Id.*

office in Washington nor did he regard his various Executive Branch positions as a series of stepping stones to a seat on the Supreme Court. Rather, as Rehnquist put it, “He served each of the interests he was bound to serve faithfully and well during the time which he undertook to serve them. He never used them as a means merely to further his own career.”⁶

Even as a Supreme Court Justice, Jackson answered a further call to government service and took on one of the most challenging assignments of his extraordinary life. He accepted President Truman’s assignment to serve as Chief Counsel of the United States in the prosecution of Nazi war criminals at Nuremburg.

Jackson temporarily took a leave of his judicial responsibilities, a matter of some controversy at the time, and returned to the role of lawyer because the President asked him to serve his country in that capacity. Jackson was to describe the courtroom at Nuremburg in words that I think are an apt description of our courtrooms around the country. He said, “They were places where Power pays tribute to Reason.”⁷

Now because Pepperdine is honoring its moot court participants this evening and because Pepperdine’s Dean—like Justice Jackson—served as a distinguished Solicitor General, I would like to say a word about Jackson as an oral advocate. He once described his tenure as Solicitor General, arguing cases before the Supreme Court on behalf of the United States, as the happiest period of his life. And like your Dean, he was very good at it.

Jackson spoke to the California State Bar some fifty-six years ago on the subject of advocacy before the United States Supreme Court.⁸ His talk is one of those rare fifty-year-old speeches that remain completely relevant today. Let me just touch on a few of his observations.

First, he noted from his vantage point on the Supreme Court that oral argument mattered.⁹ I’m sure that will be encouraging to those participants in the moot court competition today. Second, he observed that a client should choose his lawyer based on skill rather than prominence.¹⁰ Nothing impresses the court about the lawyer—only the lawyer’s argument. Jackson cautioned against flattering a Justice, noting as he put it, “We think well enough of ourselves already.”¹¹ Some things haven’t changed.

6. *Id.*

7. Robert H. Jackson, Chief Counsel for the United States, *Opening Statement Before the International Military Tribunal*, in 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INT’L MILITARY TRIBUNAL 98, 98 (Nov. 21, 1945), available at <http://avalon.law.yale.edu/imt/11-21-45.asp> (last accessed 29 Mar. 2009).

8. Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 37 Cornell L.Q. 1 (Fall 1951), available at <http://www.roberthjackson.org/documents/Advocacy%20Before%20the%20United%20States%20Supreme%20Court.pdf> (last accessed 29 Mar. 2009).

9. *Id.* at 2.

10. *Id.* at 3–4.

11. *Id.* at 4.

He urged the advocate to maintain a focus on the key arguments. In his words, “Multiplying assignments of error will dilute and weaken a good case and will not save a bad one.”¹² Despite what the four contestants might tell you, Jackson said, “Questions should be welcomed.”¹³ As he put it, “It’s clear proof that the inquiring Justice is not asleep.”¹⁴ And he also advised that in answering questions, “Be prepared to face squarely any weakness in your case. Evasion is fatal.”¹⁵ And, “Do not give strained meaning to a precedent to support your case.”¹⁶ Jackson said, “It is hard to retrieve the confidence forfeited by seeking such an advantage.”¹⁷

And he emphasized that the purpose of an argument is always and only to assist a court in resolving a legal dispute. In his words, “The case that is argued to please a client, impress a following in the audience or attract notice from the press will not often make a favorable impression on the bench. An argument is not a spectacle.”¹⁸

Justice Jackson observed that traditionally a lawyer who loses has two remedies.¹⁹ One is to appeal, and the other is to go down to the tavern and cuss out the Court. A lawyer normally can and usually does pursue both remedies simultaneously. But as a Justice, Jackson understood in his words, “That tavern cussing of the Supreme Court has to be stronger than usual to compensate for the lack of any further appeal.”²⁰

But most important, Justice Jackson saw oral advocacy as a high art. And he knew from his own experience that a skilled lawyer must have a rounded life and balanced judgment that draws inspiration not merely from the literature of the law but as he emphasized, “From the classics, history, the essay, the drama and poetry.”²¹

Jackson often expressed his view of the lawyer’s role through the parable of the three stone masons who were working together on a structure.²² A passerby asked each of them what he was doing. The first said without looking up, “Earning a living.” The second one said, pointing

12. *Id.* at 5.

13. *Id.* at 11–12.

14. *Id.* at 12.

15. *Id.* at 5.

16. *Id.* at 8.

17. *Id.*

18. *Id.* at 10.

19. *Id.* at 13.

20. *Id.*

21. *Id.* at 15.

22. *Id.* at 16.

to the wall, “I’m shaping this stone to the pattern.” But the third lifted his eyes skyward and said, “I’m building a cathedral.”

Now for some lawyers advocacy is merely a way to earn a living wage. And others cannot see beyond shaping the precedent before them into a winning pattern. But some inspired lawyers, like Justice Jackson, have understood that they are participating in a loftier enterprise. Now I am sure that our moot court participants today—as well as the most experienced lawyers among us—have felt that it takes all their skill in the heat of the moment in an oral argument to keep the walls from collapsing and being buried in the rubble.

But it is important to maintain a broader perspective. The members of the bench and the bar are together building a cathedral, the Rule of Law. And it is a structure in which we should all take great pride.

Now Jackson’s story of the three stone masons calls to my mind the medieval stone masons, the ones who built the actual cathedrals rather than the figurative ones. They would work meticulously for months, for years on the gargoyles that were at the very top of the cathedral even though the product of their efforts would never even be seen from the ground below. Now so too with our advocates of today and advocates throughout the moot court competition. They meticulously prepared answers to dozens, hundreds of questions, knowing all the time that almost all of them would never be asked by the judges.

Now the medieval stone masons said they did what they did because they were carving for the eye of God and not man. A higher purpose infused and inspired their craft. I think the advocate in court also needs to infuse his or her long and lonely preparation with a higher purpose. And that higher purpose, I would submit, is the recognition of the vital role the advocate plays in vindicating the Rule of Law.

Thank you all for making me feel so welcome here this weekend. And thank you for the wonderful Award, an Award that I will aspire and work to one day—in some small measure—deserve. Thank you very much.